388

121

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 199.

THE LEHIGH WATER COMPANY, PLAINTIFF IN ERROR,

vs.

THE CORPORATION OF THE BOROUGH OF EASTON AND THE BOARD OF WATER COMMISSIONERS OF THE BOROUGH OF EASTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED NOVEMBER 1, 1883.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, greeting:

Because in the record and proceedings as also in the rendition of judgment of a plea which is in the said supreme court of Pennsylvania before you, or some of you, being the highest court of law or equity of the said Commonwealth in which a decision could be had in the said suit between The Lehigh Water Company against The Corporation of the Borough of Easton and The Board of Water Commissioners of the Borough of Easton, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a
2 statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next (188–) in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 17th
3 day of May, in the year of our Lord one thousand eight hundred and eighty-three, and in the one hundred and seventh year of the Independence of the said United States.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

SAMUEL BELL,
Clerk Circuit Court U. S., East. Dist. of Penna.

4 [Endorsed:] The Lehigh Water Co., pl'ff in error, *vs.* The Corporation of the Borough of Easton *et al.*, def'ts in error. Writ of error to supreme court of the Commonwealth of Pennsylvania. Filed May 17, 1883.

5 THE UNITED STATES OF AMERICA, *ss:*

To The Corporation of the Borough of Easton and The Board of Water Commissioners of the Borough of Easton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Commonwealth of Pennsylvania, wherein The Lehigh Water Company [are] plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this twenty-fifth day of June, in the year of our Lord one thousand eight hundred and eighty-three.

ULYSSES MERCUR,
Chief Justice of Supreme Court of Pennsylvania.

6 STATE OF PENNSYLVANIA, }
County of Northampton, } *ss:*

Preston M. Gernet, being duly sworn according to law, deposes and says that he served the annexed citation on W. S. Kirkpatrick, Esquire, on the fifth day of July, A. D. 1883, and on Robert I. Jones, Esq., on the seventh day of July, by handing a true and attested copy thereof to each of them personally, they being the attorn*ies* of record of the said defendant in error, and that he served the said citation on Lawrence Titus, Esq., chief burgess of the borough of Easton, and John Stotzer, Esq., president of the town council of the borough of Easton, on the eighteenth day of August, A. D. 1883, by handing each of them personally a true and attested copy thereof.

PRESTON M. GERNET.

Sworn and subscribed before me this 18th day of August, 1883.

GEO. H. YOUNG, *J. P.*

7 *Bond and Warrant.*

Know all men by these presents that we, The Lehigh Water Company and John Maxwell and James W. Long, all of the borough of Easton, in the county of Northampton, are held and firmly bound unto The Corporation of the Borough of Easton and The Board of Water Commissioners of the Borough of Easton in the sum of three hundred dollars, lawful money of the United States of America, to be paid to the said The Corporation of the Borough of Easton and The Board of Water Commissioners of the Borough of Easton, their certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, our and each of our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals [and] dated the eighth day of May, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas the said The Lehigh Water Company is about to apply for a writ of error from the Supreme Court of the United States to

the supreme court of Pennsylvania in a certain suit in equity in which The Lehigh Water Company is plaintiff and The Corporation of the Borough of Easton and The Board of Water Commissioners of the Borough of Easton are defendants: Now, the condition of this obligation is such that if the said The Lehigh Water Company shall prosecute their writ of error to effect, and if the said The Lehigh Water Company shall fail to make their plea good, shall answer all costs in the said case, then this obligation to be void, or else to be and remain in full force and virtue.

JOHN MAXWELL, *President.* [SEAL.]
—— ——. [SEAL.]
JOHN MAXWELL. [SEAL.]
JAMES W. LONG. [SEAL.]

Sealed and delivered in presence of us—
DAVID W. HOWELL.
JOS. R. SHIMER.

8 [Endorsed:] Bond of The Lehigh Water Company, with sureties, to prosecute writ of error from the Supreme Court of the United States to the supreme court of Pennsylvania with effect, &c., in the case of The Lehigh Water Company *vs.* The Corporation of the Borough of Easton and The Board of Water Commissioners of the Borough of Easton. May 17th, 1883. Bond and security approved and taken by Ulysses Mercur, chief justice of the supreme court of Pennsylvania. Filed May 17, 1883.

9 Among the records of the court of common pleas of Northampton county, State of Pennsylvania (*inter alia*), it is thus contained:

Equity Docket Entry of June Term, 1882. *No.* 3.

THE LEHIGH WATER COMPANY

vs.

THE CORPORATION OF THE BOROUGH OF EASTON and THE BOARD OF WATER COMMISSIONERS OF THE BOROUGH OF EASTON.

Bill in Equity. Filed May 23, 1882. "Served."

E. J. Fox & Son.

May 23, 1882. Notice filed. Same day affidavit of John Maxwell filed. And now, October 9, 1882, appeal of defendants to Supreme Court verified by affidavit filed October 11, 1882. Certiorari from Supreme Court received and filed.

From the record.

JAMES J. COPE,
Prothonotary.

10 In the Court of Common Pleas of Northampton County. In Equity.

THE LEHIGH WATER COMPANY, Pl'ff,

vs.

THE CORPORATION OF THE BOROUGH OF EASTON and THE BOARD OF WATER COMMISSIONERS OF THE BOROUGH OF EASTON, Defts.

To The Corporation of the Borough of Easton and The Board of Water Commissioners of the Borough of Easton:

You are hereby notified that the plaintiff above named will make application to the court of common pleas of Northampton county, sitting in equity, at the court-house, on Tuesday, May 23rd, 1882, at 10 a. m., for an injunction to restrain the Corporation of the Borough of Easton and the town council of said borough from constructing or providing public water-works, or from appropriating any money for the construction of the said water-works, and the said Board of Water Commissioners from locating and con-
11 structing water-works for the supply of the citizens of Easton with water.

Yours respectfully,

EDWARD J. FOX AND SON,
Solicitors for Pl'ff.

Easton.

Served a copy of the foregoing notice on Lawrence Titus, chief burgess of the borough of Easton; E. E. Henningway, president of the town council of said borough; A. S. Knecht and Evan Buckman, two of the Board of Water Commissioners of said borough, personally, on the 18th day of May, A. D. 1882, and on Dan'l Black by leaving a copy thereof at his place of business with P. Kinsey, his clerk, he being absent from home.

Costs, $1.50.

PETER S. HULSIZER.

Filed May 23rd, 1882.

12 In the Court of Common Pleas of Northampton County, Sitting in Equity.

Between THE LEHIGH WATER COMPANY, Plaintiff,

and

THE CORPORATION OF THE BOROUGH OF EASTON and THE BOARD OF WATER COMMISSIONERS OF THE BOROUGH OF EASTON, Defendants.

To the honorable the judges of the said court:

Your orator complains and says:

1. That under and by virtue of an act of the General Assembly of this Commonwealth entitled "An act to incorporate the West Ward Water Company," approved the fourth day of May, A. D. 1854, the West Ward Water Company was incorporated for the purpose of introducing to that portion of the borough of Easton lying west of a newly-laid-out street, called Sitgreaves street, and into such portions

of Forks township as are adjacent, a supply of pure water for the use of the inhabitants of the same, as in and by the said act contained in Pamphlet Laws of 1854, pp. 545 to 549, and which your orator prays may be taken as a part of this its bill, will more fully appear.

2. That on the fifth day of May, A. D. 1855, a supplement was passed to the said act which is to be found in Pamphlet
13 Laws of 1855, pp. 448 to 450, and which your orator prays may be taken as a part of this bill, whereby it was enacted that it should be lawful for the West Ward Water Company to lay pipes, erect hydrants, introduce water, and exercise all the powers, privileges, and authority granted and conferred upon them by their act of incorporation throughout the whole extent of the borough of Easton.

3. That by the said supplement the West Ward Water Company were authorized to purchase the property of the Easton Water Company, a corporation which had erected works and had partially supplied the said borough with water, subject to the liabilities, restrictions, regulations, and requirements contained in the act of incorporation of the Easton Water Company and the several supplements thereto.

4. That by the said act of incorporation and the said supplement the said The West Ward Water Company were required from time to time, and at all times, to furnish water for the extinguishment of fires free of charge to the said borough at points and places along improved property supplied with water by said company, and to erect and keep in repair at their own expense fire-plugs for furnishing water as aforesaid, and in the event of an ornamental fountain being erected by the borough or citizens thereof to supply the same with a reasonable quantity of water free of charge.

5. That section 8 of the said supplement enacts as follows, viz: "That it shall not be lawful for the said The West Ward Water Company, after the passage of this act, to make a dividend among the stockholders thereof of any greater sum than ten per cent. of the net proceeds of the said company, and whenever the same shall exceed such sum the excess thereof shall, under the approval of the court of common pleas of said county of Northampton, be invested in trust for the use of the said borough of Easton from time to time, until the amount of such fund shall equal the actual cost of
14 the said water company for the erection and construction of said works as aforesaid, when the said company shall accept the same, and in consideration thereof transfer all the rights and property aforesaid to the corporation of the borough of Easton, and until such time it shall be the duty of the managers of said company to make and report to the said court an annual statement of the business affairs of the said company."

6. That pursuant to the powers and authority conferred upon them by the said act of incorporation and the said supplement the said The West Ward Water Company did construct an entirely new waterworks for the purpose of supplying the inhabitants of the borough of Easton with water by erecting upon the river Lehigh a large and expensive engine-house, placing therein a very powerful and expen-

sive engine, by purchasing in the township of Forks, adjacent to the said borough, a large and valuable lot for reservoirs and constructing a reservoir thereon, by connecting the said engine-house and the said reservoir with a large iron pumping main and at great cost connecting the said reservoir by a large supply-pipe with the supply-pipes through the various parts of the inhabited portion of the borough of Easton, and by means thereof did furnish to the said inhabitants of the said borough a supply of pure water from the said river for the domestic and business uses of the said inhabitants, and did also erect a large number of fire-plugs and supply the same with water without charge to the said inhabitants.

7. That in addition thereto the said The West Ward Water Company purchased from the Eastern Water Company all their works for the supply of water to the inhabitants of said borough, except that portion of their works that furnished a supply to a portion of the said borough of Easton from springs situated on Chestnut Hill near said borough.

15 8. That the sums expended by the said The West Ward Water Company in the construction of their works and the purchase of the works of The Easton Water Company amounted to the sum of ninety-three thousand dollars, as your orator is informed and believes, and that the investment having proved unprofitable, the said company became embarrassed and was unable to pay its debts, and proceedings were commenced in the court of common pleas of Northampton county for the collection of a large sum of money from the said company, in consequence of which it became evident that the property of the said company would be sold at sheriff's sale.

9. That pending the said proceedings, to wit, on the 20th day of March, A. D. 1860, another supplement to the said act incorporating the West Ward Water Company was passed, and which is found in Pamphlet Laws of 1860, pp. 226-7, and which your orator prays may be taken as a part of this its bill, by which said supplement it was provided that the said company were empowered to mortgage all their estate and their chartered and corporate franchises, rights, and privileges to those persons who as endorsers, sureties, or guarantors had paid, or were liable to pay, the indebtedness of said company, and that at any judicial sale which might be had under said mortgage all the estate, franchises, rights, and privileges of said company passed to and vested in the purchasers, who were then authorized to organize a corporation under the name and style of The Lehigh Water Company.

10. That by the same act the corporation of the borough of Easton was authorized to become the purchaser and to borrow money to make the purchase.

11. That at the sale by the sheriff of the said works the same were purchased by certain citizens of Easton for the sum of forty thousand dollars, who then organized as a corporation under the name of the Lehigh Water Company.

16 12. That the said The Lehigh Water Company paid to the sheriff of said county the sum of forty thousand dollars, being

the aforesaid purchase-money, in the year 1860, and the stockholders of the said company, in the years 1861 and 1862, paid into the treasury of said company the sum of thirty thousand dollars, which was expended in the extension and improvement of the works of the said company; that in the month of December, A. D. 1881, the said plaintiff borrowed the sum of twenty thousand dollars and gave their bonds to secure the payment thereof, which, together with the sum of thirty-six thousand nine hundred and three dollars and ninty cents, received from water rents from the time of the organization of said company up to the time of filing this bill, was expended in the enlargement and improvement of the said water-works, and chiefly in erecting upon the banks of the river Delaware, in addition to their works upon the Lehigh, an engine-house and pumping-engine, and in procuring a large quantity of water-pipe of large size connecting the works upon the Delaware with the mains connected with the Lehigh works in the streets of Easton.

13. That in the year 1877 a dispute arose between the said corporation of the borough of Easton and the Lehigh Water Company as to the number of fire-plugs which the Lehigh Water Company were bound to erect in the said borough, the said corporation claiming that the said company were bound to erect twenty-six fire-plugs in addition to those theretofore erected in said borough; and on the tenth day of October, 1877, the said corporation of the borough of Easton presented its petition to the court of common pleas of the said county for a writ of mandamus to compel the Lehigh Water Company to erect twenty-six additional fire-plugs in the borough of Easton; and, after a hearing, the said court granted a writ of mandamus to compel the said company to erect the said twenty-six fire-plugs; and, a writ of error being taken to the supreme
17 court of Pennsylvania, the judgment of the said court of common pleas was affirmed, as by the record and proceedings of which said suit, which is No. 8, December term, 1877, and which your orator prays may be taken as a part of this its bill, will more fully and at large appear.

14. That on the twentieth day of April, 1874, an act of assembly was passed entitled "An act to provide for the incorporation and regulation of certain corporations;" that section 34 of said act relates to water and gas companies, and that by clause 3 of said section it is provided as follows, to wit:

"The right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one; and no other company shall be incorporated for that purpose until the said corporations shall have from its earnings realized and divided among its stockholders during five years a dividend equal to eight per centum per annum upon its capital stock."

15. That by clause 7 of said section it is provided as follows: "It shall be lawful at any time after twenty years from the introduction of water or gas, as the case may be, into any place as aforesaid for the town, borough, city, or district into which the said company shall be located to become the owners of said works and the prop-

erty of said company by paying therefor the net cost of erecting and maintaining the same, with interest thereon at the rate of ten per centum per annum, deducting from said interest all dividends heretofore declared."

16. That by section 26 of said act it is provided as follows: "Corporations for any of the purposes named and covered by the provisions of this act heretofore created by any special act, or in existence under the provisions of any general law of this Commonwealth, upon accepting the provisions of the constitution of this act by
18 writing under the seal of said corporation, duly filed in the office of the secretary of the Commonwealth, shall be entitled to all the privileges, immunities, franchises, and powers conferred by this act upon corporations to be created under the same; and upon such acceptance and approval thereof by the Governor, he shall issue letters patent to said corporation reciting the same."

17. That on the 21st day of June, 1880, the said company did accept the provisions of the said last-mentioned act, and thereby became entitled to all the privileges, immunities, and franchises conferred by the said act.

18. That since their acceptance, as aforesaid, the said plaintiff purchased the lot of land upon the river Delaware, and erected thereupon the said engine-house, and have put therein a large and powerful pumping-engine, and have purchased and partly laid a large quantity of pipe to connect their said works on the Delaware with the system of pipes throughout said borough, and expect soon to complete the same so as to furnish a supply of water from the said river Delaware, the whole of which works involve an additional outlay and expenditure by the said company of the sum of seventy-five thousand dollars and upwards.

19. That on or about the twelfth day of May, 1881, your orator made a written offer to sell the water-works of the said plaintiff to the corporation of the borough of Easton at cost, with a six per cent. per annum interest after deducting all dividends and interest received by the stockholders of the said company, or if the said borough preferred it, the said company offered to sell its works to said borough at an amount named by any three disinterested and competent appraisers agreed upon by the parties; but that the said borough did not accept either of the offers made by your orator.

20. That on the twelfth of March A. D. 1867, an act of assembly was passed, which is to be found in Pamphlet Laws of 1867,
19 pp. 412, 413, and 414, which your orator prays may be taken as a part of this its bill, by which said act the corporation of the borough of Easton was authorized to construct and provide public water-works for said borough, and was authorized to buy the works of any existing water companies then in operation, with the rights, privileges, powers, and franchises to them belonging, in case it should be deemed advisable, provided that the amount paid in such purchase should not exceed the sum paid by said existing water companies, with six per centum thereon after deducting all dividends and interests received by the stockholders thereof.

21. That by the third section of said act the qualified voters of

said borough should at the next election select three competent freeholders to compose a board of water commissioners, who should have full power and authority to carry the said act into effect, and by contract or otherwise locate and construct water-works with sufficient reservoir, using the water from the river Delaware, and generally with power to make all contracts and purchases necessary therefor.

22. That on the fifteenth day of April, 1867, an act of the General Assembly was passed which is to be found in Pamphlet Laws of 1867, p. 1254, which provided that the qualified voters of Easton should have the right to determine by vote the expediency of constructing borough water-works by said corporation, and which provided further that, in case the majority of said voters were in favor of said act, it should be the duty of the town council forthwith to proceed to carry out the provisions of said act; but in case the majority should pronounce against the same that all proceedings under the act might be suspended until the citizens determined thereafter at some spring election to carry out its provisions and construct public water-works.

23. That at the spring election in the year 1868 the qualified voters of said borough, by a majority of those voting at said election, determined against the expediency of the erection of water-works by said borough, and that no vote was taken upon said question at any election until the year 1880, when a majority of said citizens again decided by their votes against the expediency of the erection of water-works by said borough, and at an election held in the spring of 1881 a majority of the citizens of said borough voted in favor of the erection of water-works by said borough.

24. That in the year 1881 the water commissioners of said borough were Daniel Black, Evan Buchman, and Amandus Steinmetz, who after the said election made a contract for the purchase of a lot on the banks of the river Delaware upon which to locate a pumping-works of the water-works to be erected by the corporation of the borough of Easton, and on the eighth day of August, 1881, the said board of water commissioners presanted their petition to the court of common pleas of Northampton county setting forth that the said water commissioners had selected a site on the river Delaware for the erection of the water-works and the buildings and appliances necessary thereto, and also a site for the reservoirs on the hill adjacent, to which they proposed to pump water from the Delaware river, for supplying the citzens through pipes, as the law provides, and praying the court to issue a writ of mandamus to compel the said town council of the borough of Easton to forthwith carry out the provisions of the said act of 1867, and to issue bonds to raise the money necessary for the erection and construction of public water-works for said borough and vicinity, which said writ was No. 3 of October term, 1881, and is still pending and undetermined in said court.

25. That at the election in February, 1882, Abram S. Knecht was elected one of the board of water commissioners in place of Amandus Steinmetz, whose term expires in the spring of 1882.

21 26. That your orator believes that unless they are restrained by injunction of this court the said water commissioners are about to erect a water-works to furnish a supply of water to the inhabitants of the borough of Easton, whereby your orator will suffer great and irreparable injury, and the water-works of your orator and the franchises of your orator will thereby be rendered valueless.

27. That your orator is advised that the grant to the said borough of the privilege to erect water-works by the act of 1867 has no validity, inasmuch as the said borough did not avail itself of the privileges conferred by said act before the adoption of the present constitution of this Commonwealth, and that the said grant has no longer any validity under article 16, section 1, of said constitution.

28. That your orator is advised, under the act of 1874, that the said borough has no right to erect water-works, inasmuch as the right of your orator to supply the citizens of said borough with water at this time is an exclusive one.

29. That the acts of March 12, 1867, impair the obligation of the contract made between the State of Pennsylvania and your orator, which contract was established by the passage of the act of assembly hereinbefore recited in reference to the West Ward Water Company and the Lehigh Water Company, and the acceptance by the said companies of the provisions of the said act, the expenditure of their money in the erection of water-works, and their enlargement and improvement from time to time, and the fulfillment of their obligations under the acts of assembly aforesaid.

Your orator asks the following equitable relief:

1. That your honors will restrain by injunction preliminary until final hearing, and after final hearing perpetual, the corporation of the borough of Easton and the town council of said borough
22 from constructing or providing public water-works or from appropriating any money for the construction of the said water-works and the said Board of Water Commissioners from locating and constructing water-works for the supply of the citizens of Easton with water.

2. Such further and other relief as the nature and circumstances of the case shall require and to your honors shall seem meet.

THE LEHIGH WATER COMPANY,
By JOHN MAXWELL, *President.*

NORTHAMPTON COUNTY, *ss:*

John Maxwell, president of the Lehigh Water Company, being duly sworn according to law, deposes and says that the facts set forth in the foregoing bill of complaint are true to the best of his knowledge, information, and belief.

Sworn and subscribed before me — ——, 1882.

—— ——.

We certify that, in our opinion, this case is of such a nature that no adequate remedy can be obtained at law.

EDWARD J. FOX & SON,
Solicitors for Plaintiff.

23 NORTHAMPTON COUNTY, *ss:*

A. W. Herman, being duly sworn according to law, deposes & says he served a copy of the within bill in equity on L. Titus, chief burgess of the borough of Easton, personally, on May 24th, 1882; on A. S. Knecht, personally, May 25th, 1882; on E. Buchman, personally, June 15th, 1882, and on D. Black, by leaving a true and attested copy of the within bill in equity at his residence, on June 14th, 1882.

A. W. HERMAN.

Sworn & subscribed to before me this 21st day of June, 1882.
JAMES J. COPE, *Prot.*

24 *Affidavit in Support of Bill of Complaint.*

NORTHAMPTON COUNTY, *ss:*

John Maxwell, being duly sworn according to law, deposes and says as follows:

That the Lehigh Water Company become the purchaser of the works of the West Ward Water Company at a sale made by the sheriff of said county, for the sum of forty thousand dollars, in the year eighteen hundred and sixty, and that since that time the Lehigh Water Company have supplied the citizens of said borough with a supply of water at the rates fixed by law, and also water for the extinguishment of fires, without compensation, and within one year last past have erected an engine-house on the river Delaware, and put therein a large and powerful pumping-engine, and are connecting therewith a system of pipes and other devices for a more abundant supply of the said borough of Easton, which said improvements will involve an expenditure by the said company of seventy-five thousand dollars and upwards.

That the water commissioners of said borough have made a contract for the purchase of a lot of land on the banks of the river Delaware, upon which they design to locate a pumping-works and to construct a water-works to supply the citizens of Easton with water, and have applied to the court of common pleas of Northampton county aforesaid for a writ of mandamus to compel the town council of the borough of Easton to issue bonds to raise the money necessary for the erection and construction of public water-works for said borough and vicinity, as this deponent is informed and verily believes.

JOHN MAXWELL.

Sworn and subscribed before me this 19th day of May, 1882.
REUBEN KOLB, *J. P.*

25 *Docket Entries.*

Supreme Court, Eastern District. January Term, 1883.

E. J. Fox & Son.

Appeal of the Lehigh Water Company from decree of said court

made in a certain case in equity, wherein the said appellant is plaintiff and the Corporation of the Borough of Easton *et al.* are defendants.

Certiorari to the court of common pleas of the county of Northampton, ret'ble the first Monday of March, 1883. Ex'it- Oct. 11, 1882.

March 5, 1883.—Record returned & filed.

Eo die.—Assignments of error filed.

March 6, 1883.—Argued April 9, 1883. The decree is affirmed, and the bill is dismissed at the costs of the appellants.

Opinion by Paxson, J.

May 17, 1883.—Writ of error from the Supreme Court of the United States brought into office.

Eo die.—Bond filed.

26 *Præcipe.*

In the Supreme Court of Pennsylvania.

THE LEHIGH WATER COMPANY, Appellant and Plaintiff below,

vs.

THE CORPORATION OF THE BOROUGH OF EASTON AND THE BOARD OF Water Commissioners of the Borough of Easton, Appellees and Defendants below.

Sur appeal of the Lehigh Water Company from the decree of the court of common pleas of Northampton county, sitting in equity.

The Lehigh Water Company hereby appeals from the decree of the court of common pleas of Northampton county, sitting in equity, to the supreme court of Pennsylvania.

JOHN MAXWELL, *President.*

NORTHAMPTON COUNTY, *ss:*

John Maxwell, president of the Lehigh Water Company, being duly sworn according to law, deposes and says that the appeal taken in the above case is not intended for delay.

JOHN MAXWELL, *President.*

Sworn and subscribed before me October 9th, 1882.

JAMES J. COPE,
Prothonotary.

Filed Oct. 10, 1882.

27 *Bond for Costs.*

In the Supreme Court of Pennsylvania for the Eastern District.

THE LEHIGH WATER COMPANY, Plaintiff in Error and Plaintiff Below,
vs.
THE CORPORATION OF THE BOROUGH OF EASTON and THE BOARD OF WATER COMMISSIONERS OF THE BOROUGH OF EASTON, Defendants in Error and Defendants Below. } No. 3.

Sur- appeal to the court of common pleas for the county of Northampton, sitting in equity, of June term, 1882.

We, The Lehigh Water Company, Jesse Lives and Jacob Roder, all of the borough of Easton, severally acknowledge to owe the above-named defendants in the sum of one hundred dollars, upon condition that the above-named plaintiffs in error prosecute their appeal with effect; and, if the decree be affirmed or the appeal be discontinued or non-prossed, that they pay the costs adjudged or accruing upon such appeal and all other costs that may be awarded upon such appeal, and for the return to the court below of the record with the remittitur, or else we will do it for the said plaintiff in error.

JOHN MAXWELL, [SEAL.]
President.

JESSE LIVES.
J. RODER.

Taken and acknowledged this ninth day of October, A. D. 1882.

[SEAL.] JAMES J. COPE,
Prothonotary.

28 EASTERN DISTRICT OF PENNSYLVANIA, } *ss:*
City and County of Philadelphia, }

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Northampton, Greeting:

We being willing, for certain causes, to be certified of the matter of the appeal of the Lehigh Water Company from a decree in said court made in the case wherein The Lehigh Water Company was plaintiff and The Corporation of the Borough of Easton and The Board of Water Commissioners of the Borough of Easton were defendants, before you, or some of you, depending, do command you that the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court of Pennsylvania, at a supreme court to be holden at Philadelphia, in and for the eastern district, the first Monday of March next, being the 9th Monday following the first Monday of January, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable Ulysses Mercur, doctor of laws, chief justice of our said supreme court, at Philadelphia, the tenth day of

October, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] CHAS. S. GREENE,
Prothonotary.

29 To the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in equity, for the eastern district:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded, excepting affidavit of J. Roder, filed May 23, 1882.

O. H. MYERS, *P. J.* [SEAL.]

[SEAL.] JAMES J. COPE, *Proth'y.*

[Endorsed:] No. 3. June T., 1882. In equity. No. 63. January term, 1883. Supreme court. Appeal of the Lehigh Water Company. Certiorari to the court of common pleas for the county of Northampton. Returnable the first Monday of March, 1883. Rule on the appellee to appear and plead on the return day of the writ. Oct. 11, 1882, filed. I hereby certify that Jesse Lives and J. Roder are securities for costs in the sum of one hundred ($100) dollars. Chas. S. Greene, proth'y. Edward J. Fox & Son, att'ys.

30 The Supreme Court of Pennsylvania, Easton District.

THE LEHIGH WATER COMPANY, Appellant and Plaintiff Below,

vs.

THE CORPORATION OF THE BOROUGH OF EASTON and THE BOARD of Water Commissioners of the Borough of Easton, Appellees and Defendants below.

Assignment of Error.

First. The court erred in refusing to grant the injunction prayed for in the bill of complaint.

Second. The court erred in dismissing the bill of the complaint.

EDWARD J. FOX,
EDWARD J. FOX, JR.,
For Appellant.

Filed March 5, 1883.

31 S. C., Eastern District. In Equity.

Appeal of The Lehigh Water Company from the Decree of the Court of Common Pleas of Northampton County.

PAXSON, *J.:*

This was an appeal from the refusal of the court below to grant a special injunction. With a view to obtain a decision of this court upon the whole case an agreement was filed at bar giving to the decision below the effect of a final decree. We will therefore treat it

as a decree entered upon a general demurrer to the bill. This admits all the facts sufficiently averred by the plaintiffs, which places them in as favorable a position as they could desire.

The plaintiffs seek to restrain the borough of Easton (defendants) from erecting water-works for the purpose of supplying said borough with water. The facts necessary to a proper understanding of the case, briefly stated, are as follows:

On the 12th of March, 1867, an act of Assembly was passed authorizing the borough of Easton to construct water-works and to buy the works of any existing water companies, the works to be erected by three water commissioners to be elected by the qualified voters of the borough. P. L., 412. A supplement to this act was passed on April 15, 1867, providing that the water-works
32 should not be built by the borough until after the question of the erection of said works had been submitted to a popular vote at a special election, when, if a majority of the qualified voters were in favor of such erection, the town council should proceed to construct said works. A vote was taken at the spring election in 1881, resulting in a majority in favor of the works. Three persons were elected water commissioners at the same time, who purchased a lot upon which to erect said works and presented a petition to the court of common pleas of Northampton county for the purpose of compelling the town counsel of the borough of Easton to supply the necessary funds.

The Lehigh Water Company, plaintiff, is a corporation duly authorized by its charter to supply the borough of Easton with water, and has expended a large amount of money in the construction of its works. It is required by its charter to erect a sufficient number of fire plugs and supply water to the borough for the extinguishment of fires without charge. This obligation has been performed, at least in part, and it has furnished the citizens of the borough with water. On the 21st of June, 1880, the said company accepted the provisions of the act of 29th April, 1874, P. L. 93, the 34 section of which provides for the incorporation of water companies, and enacts that "The right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one," &c.

33 The grounds upon which the water company seeks to restrain the borough are: 1st. That under the act of 1874 the right of the water company is exclusive; 2nd, that the borough has no power, under the act of 1867, to construct water-works; and, 3rd, that to do so would contravene article I, section X, of the Constitution of the United States, which declares that "no State shall pass any law impairing the obligation of contracts." Neither of these positions can be sustained. While the language, from the act of 1874, above quoted, would seem to favor the exclusive right claimed by the water company, a careful examination of clause 3 of section 34 shows that the Legislature intended that the right should be exclusive only as against other water companies, for immediately in this connection occur the words: "And no other company shall be incorporated for that purpose until the said corporation shall have,

from its earnings, realized and divided among its stockholders during five years a dividend equal to eight per centum per annum upon its capital stock." The provision that another company shall not be incorporated was not intended to prohibit a city or borough from providing its citizens with pure water by means of works constructed by itself from money in its own treasury. Aside from this, the water company claims this exclusive right by reason of the act of
34 1874, while the right of the borough to construct the works was conferred by the prior act of 1867, and there is no pretence that the one act repeals the other.

It was urged on behalf of the water company, however, that the borough cannot invoke the aid of the act of 1867, for the reason that, not having availed itself thereof prior to the adoption of the Constitution, the right to do so now is taken away by section I of article 16 of that instrument, which provides that "All existing charters or grants of special or exclusive privileges, under which a *bona fide* organization shall not have taken place and business been commenced in good faith at the time of the adoption of this constitution, shall thereafter have no validity." The 16th article of the Constitution has reference to "private corporations," and it is to such corporations alone that the first section applies. It was intended to extinguish a vast number of charters obtained for speculative purposes, under which "a *bona fide* organization had not taken place," nor "business been commenced in good faith," but which were being hawked about, to the manifest shame of the Commonwealth. No one ever supposed that this article was intended to repeal an act of Assembly conferring additional powers upon a municipal corporation for the mere reason that the power had not been exercised in
35 whole or in part. It was urged, however, with considerable ingenuity that in erecting water-works and supplying its citizens with water the borough was not acting in its capacity as a municipal corporation, but rather in that of a private or business corporation, and The Western Saving Fund Society *vs.* The City, 7 Casey, 175, and Wheeler *vs.* The City, 27 P. F. S., 338, were cited in support of this proposition. Those cases decide that when a municipal corporation undertakes to supply its citizens with gas and water it must be held to its contracts precisely as a private corporation. But that it is none the less a municipal corporation plainly appears from Wheeler *vs.* The City, where it was attempted to restrain the city from borrowing money for the use of the gas-works upon the ground that such borrowing was prohibited by article IX, section 7, of the Constitution, which declares that the "General Assembly shall not authorize any county, city, borough, township, or incorporated district to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or loan its credit to, any corporation, association, institution, or individual." The gas cases establish the principle that a municipal corporation may perform the functions of a private corporation in supplying its citizens with gas and water. But
36 that by doing so it loses its distinctive municipal character is a proposition that does not require discussion.

The third ground of objection is wholly without merit. By constructing water-works of its own the borough will not destroy the franchises of the plaintiff company. It may impair their value, and probably will do so; but of this the company have no legal cause of complaint. The granting of a new charter to a new corporation may sometimes render valueless the franchises of an existing corporation; but unless the State by contract has precluded itself from such new grant the incidental injury can constitute no obstacle. Charles River Bridge *vs.* Warren Bridge, 11 Peters, 420; Turnpike Company *vs.* The State of Maryland, 3 Wallace, 210; Piscataqua Bridge *vs.* New Hampshire Bridge, 7 N. H., 35.

No contract has been shown between the water company and the State by which the latter is precluded from granting to the borough of Easton the privilege of erecting works to supply its citizens with water.

We need not pursue the subject further in view of the elaborate and careful opinion of the learned judge below.

The decree is affirmed and the bill dismissed at the costs of the appellants.

Filed April 9th, 1883.

37 I, Charles S. Greene, prothonotary of the supreme court in and for the eastern district of Pennsylvania, do hereby certify that the above and foregoing is a true and complete copy of the proceedings in the above-entitled case so full and entire as appears of record in said supreme court.

In testimony whereof I have hereunto set my hand and the seal of said supreme court in and for the eastern district of Pennsylvania this 7th day of September, A. D. 1883.

[Seal of the Supreme Court of Pennsylvania.]

CHAS. S. GREENE,
Prothonotary.

Endorsed on cover: Pennsylvania supreme court. No. 199. The Lehigh Water Company, plaintiff in error, *vs.* The Corporation of the Borough of Easton and The Board of Water Commissioners of the Borough of Easton. Filed 1st November, 1883.

121-388

JAN 12 1887
JAMES H. McKINNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1886. NO. 199.

THE LEHIGH WATER COMPANY,

PLAINTIFF IN ERROR,

VS.

THE CORPORATION OF THE BOROUGH OF EASTON AND THE BOARD OF WATER COMMISSIONERS OF THE BOROUGH OF EASTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD J. FOX,
EDWARD J. FOX, JR.,
Counsel for Plaintiff in Error.

WEST'S PRINTING HOUSE.

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Supreme Court of the United States

October Term 1886. No. 199.

THE LEHIGH WATER COMPANY,

Plaintiff in Error

vs.

THE CORPORATION OF THE BOROUGH OF EASTON AND THE BOARD OF WATER COMMISSIONERS OF THE BOROUGH OF EASTON.

In Error to the Supreme Court of the state of Pennsylvania.

Brief for Plaintiff in Error.

EDWARD J. FOX.
EDWARD J. FOX, JR.
Attorneys for Plaintiff in Error.

STATEMENT OF FACTS.

This is a bill in equity filed by the Lehigh Water Company, a corporation chartered under the laws of Pennsylvania, in the Court of Common Pleas of Northampton County, in that state, to restrain the corporation of the Borough of Easton from erecting and constructing water works in the Borough of Easton, in which the works of the water company were located. The following facts appear in the Bill in Equity and in the various statutes of the Commonwealth of Pennsylvania, referred to in the Bill in Equity and printed at length in the appendix to this brief.

In 1817 the Legislature of Pennsylvania incorporated the Easton Water Company, and authorized that company to erect water works in the Borough of Easton for the purpose of supplying the citizens of that borough with water for domestic and manufacturing purposes and for the extinguishment of fires, under which charter the company erected water works.

In 1854 the West Ward Water Company was incorporated by the Legislature of Pennsylvania, and the company was authorized to supply water in that part of the Borough of Easton to which the pipes of the

Easton Water Company did not extend, and to the people of a township contiguous to the borough.

In 1855 a supplement to the act incorporating the West Ward Water Company was passed, authorizing that company to lay pipes, erect hydrants and introduce water into all parts of the Borough of Easton and authorizing that company to purchase the works of the Easton Water Company.

The West Ward Water Company then purchased all the works of the Easton Water Company, except that portion of their works which furnished a limited supply of water from springs upon a hill near the town.

Pursuant to the original act of incorporation, the West Ward Water Company then constructed an entirely new water works, by erecting on the river Lehigh, a large and expensive engine house, and placing therein a very costly and powerful engine, erecting a new reservoir, connecting the engine house and reservoir by a large pumping main, and the new reservoir with a large main connecting with the supply pipes which had been used by the Easton Water Company.

By the said act of incorporation and its supplement, the West Ward Water Company were required from time to time, and at all times, to furnish water for the extinguishment of fires free of charge to the said borough, at points and places along improved property, supplied with water by said company, and to erect and

keep in repair at their own expense fire plugs for furnishing water as aforesaid, and in the event of an ornamental fountain being erected by the borough or citizens thereof to supply the same with a reasonable quantity of water free of charge.

Section 8, of the said supplement provided, "That it "shall not be lawful for the said The West Ward Water "Company, after the passage of this act, to make a divi- "dend among the stockholders thereof of any greater "sum than ten per cent. of the net proceeds of the said "company, and whenever the same shall exceed such "sum the excess thereof shall, under the approval of "the Court of Common Pleas of said County of North- "ampton, be invested in trust for the use of the said "Borough of Easton from time to time, until the amount "of such fund shall equal the actual cost of the said "Water Company, for the erection and construction of "said works as aforesaid, when the said company shall "accept the same, and in consideration thereof transfer "all the rights and property aforesaid to the corpora- "tion of the Borough of Easton; and until such time, "it shall be the duty of the managers of said company "to make and report to the said Court an annual state- "ment of the business affairs of the said company."

The sums expended by the West Ward Water Company in the construction of their works, and the purchase of the works of the Easton Water Company,

amounted to the sum of ninety-three thousand dollars, and the investment having proved unprofitable, the said company became embarrassed and was unable to pay its debts, and proceedings were commenced in the Court of Common Pleas of Northampton County for the collection of a large sum of money from the said company, in consequence of which, it became evident, that the property of the said company would be sold at sheriff's sale.

Pending the said proceedings, to wit: On the 20th day of March, A. D. 1860, another supplement to the act incorporating the West Ward Water Company was passed, by which supplement it was provided that the said company were empowered to mortgage all their estate and their chartered and corporate franchises, rights and privileges to those persons who as endorsers, sureties or guarantors had paid, or were liable to pay, the indebtedness of said company; and that at any judicial sale which might be had under said mortgage, all the estate, franchises, rights and privileges of said company passed to, and vested in the purchasers, who were then authorized to organize a corporation under the name and style of the Lehigh Water Company.

By the same act, the Corporation of the Borough of Easton was authorized to become the purchaser, and to borrow money to make the purchase.

At the sale by the sheriff of the said works, they

were purchased by certain citizens of Easton for the sum of forty thousand dollars, who in 1860 organized as a corporation under the name of the Lehigh Water Company.

During the years 1860, 1861 and 1862, the Lehigh Water Company expended thirty thousand dollars in the extension and improvement of their works, and in 1881 expended nearly fifty-seven thousand dollars in the enlargement and improvement of their water works and in erecting upon the banks of the river Delaware, in addition to their works upon the Lehigh, an engine house and pumping engine and in procuring a large quantity of water pipe of large size connecting the works upon the Delaware with the mains connected with the Lehigh works in the streets of Easton.

In the year 1877, a dispute arose between the Corporation of the Borough of Easton and the Lehigh Water Company as to the number of fire plugs which the Lehigh Water Company were bound to erect in the said borough. The Borough authorities claimed that the water company were bound to erect twenty-six fire plugs in addition to those heretofore erected in said borough. On the tenth day of October, 1877, the Corporation of the Borough of Easton presented its petition to the Court of Common Pleas of the said county for a writ of mandamus to compel the Lehigh Water Company to erect twenty-six additional fire plugs in the

Borough of Easton. After a hearing, the said Court granted a writ of mandamus to compel the said company to erect the said twenty-six fire plugs; and a writ of error being taken to the Supreme Court of Pennsylvania, the judgment of the Court of Common Pleas was affirmed.

In 1873 the new Constitution of Pennsylvania was adopted, which provided for the chartering of corporations under general laws, and in 1874 the Legislature passed "an act to provide for the incorporation and "regulation of certain corporations."

By section 26 of said act, it is provided as follows: "Corporations for any of the purposes named and cov- "ered by the provisions of this act heretofore created "by any special act, or in existence under the provis- "ions of any general law of this commonwealth, upon "accepting the provisions of the constitution and of "this act by writing under the seal of said corporation, "duly filed in the office of the Secretary of the Com- "monwealth, shall be entitled to all the privileges, im- "munities, franchises and powers, conferred by this act "upon corporations, to be created under the same; and "upon such acceptance and approval thereof by the "governor, he shall issue letters patent to said corpora- "tion reciting the same."

On the 21st day of June, 1880, the Lehigh Water Company did accept the provisions of the said last men-

tioned act, and thereby became entitled to all the privileges, immunities and franchises conferred by the said act.

Section 34 of said act relates to water and gas companies, and by clause 3 of said section, it is provided as follows, to wit: "The right to have and enjoy the fran-"chises and privileges of such incorporation within the "district or locality covered by its charter shall be an "exclusive one; and no other company shall be incor-"porated for that purpose until the said corporation "shall have from its earnings realized and divided "among its stockholders during five years a dividend "equal to eight per centum per annum upon its capital "stock."

By clause 7 of said section it is provided as follows: "It shall be lawful at any time after twenty years from "the introduction of water or gas as the case may be "into any place as aforesaid for the town, borough, city "or district into which the said company shall be located "to become the owners of said works, and the property "of said company by paying therefor the net cost of "erecting and maintaining the same with interest "thereon at the rate of ten per centum per annum, de-"ducting from said interest all dividends theretofore "declared."

The expenditure of the $57,000 in the erection of the new works on the Delaware was made after the accept-

ance by the Water Company of the provisions of the act of 1874.

On March 12th, 1867, the Legislature of Pennsylvania passed an act, by the provisions of which act the Corporation of the Borough of Easton was authorized to construct and provide public water works for said borough, and was authorized to buy the works of any existing water companies then in operation with the rights, privileges, powers and franchises to them belonging, in case it should be deemed advisable, provided that the amount paid in such purchase should not exceed the sum paid by said existing water companies with six per centum thereon after deducting all dividends and interests received by the stockholders thereof.

By said act the qualified voters of said borough were authorized to elect three competent freeholders to compose a board of water commissioners, who should have full power and authority to carry the said act into effect, and by contract or otherwise locate and construct water works with sufficient reservoir, using the water from the river Delaware, and generally with power to make all contracts and purchases necessary therefor.

On the 15th day of April, 1867, an act of the General Assembly was passed, which provided that the qualified voters of Easton should have the right to determine by vote the expediency of constructing borough

water works by said corporation, and which provided further, that in case the majority of said voters were in favor of said act, it should be the duty of the Town Council forthwith to proceed to carry out the provisions of said act, but in case the majority should pronounce against the same, that all proceedings under the act might be suspended until the citizens determined thereafter at some spring election to carry out its provisions and construct public water works.

At the spring election in the year 1868 the qualified voters of said borough, by a majority of those voting at said election, determined against the expediency of the erection of water works by said borough, and a vote was again taken upon said question in the year 1880, when a majority of said citizens again decided by their votes against the expediency of the erection of water works by said borough.

On or about the 12th day of May, 1881, the Lehigh Water Company made a written offer to sell the water works of the said company to the corporation of the Borough of Easton at cost, with six per cent. per annum interest, after deducting all dividends and interests received by the stockholders of the said company, or if the said borough preferred it, the said company offered to sell its works to said borough at an amount named by any three disinterested and competent appraisers agreed upon by the parties; but the said borough did

not accept either of the offers made by the water company.

In 1881 an election was again held under the provisions of the act of 1867, when a majority of the citizens of the borough voted in favor of the erection of water works by the Corporation of the Borough of Easton. The same year, after the election, the water commissioners of the borough made a contract for the purchase of a lot on the bank of the river Delaware, upon which they intended to erect a pumping works and, also selected a site for a reservoir on the hill adjacent to the Delaware for supplying the citizens of Easton with water.

The water commissioners of the borough then applied to the Court of Common Pleas of Northampton County for a mandamus to compel the town council to issue bonds to raise the money necessary for the erection and construction of the water works.

The Lehigh Water Company thereupon filed a bill in equity, in the Court of Common Pleas of Northampton County, setting forth the facts stated in the foregoing history and alleging as follows:

1. That the plaintiff believed that unless they are restrained by injunction of this Court the said water commissioners are about to erect a water works to furnish a supply of water to the inhabitants of the bor-

ough of Easton, whereby the plaintiff will suffer great and irreparable injury, and the water works of the plaintiff and the franchises of the plaintiff will thereby be rendered valueless.

2. That the plaintiff was advised that the grant to the said Borough of the privilege to erect water works by the act of 1867 has no validity, inasmuch as the said borough did not avail itself of the privileges conferred by said act before the adoption of the present constitution of the commonwealth, and that the said grant has no longer any validity under Article 16, Section 1, of said constitution.

3. That the plaintiff was advised that under the act of 1874 the said borough has no right to erect water works, inasmuch as the right of the plaintiff to supply the citizens of said borough with water at this time is an exclusive one.

4. That the acts of March 12, 1867, impair the obligation of the contract made between the State of Pennsylvania and the plaintiff, which contract was established by the passage of the Act of Assembly herein before recited in reference to the West Ward Water Company and the Lehigh Water Company, and the acceptance by the said companies of the provisions of the

said act, the expenditure of their money in the erection of water works, and their enlargement and improvement from time to time, and the fulfillment of their obligations under the Acts of Assembly aforesaid.

The prayer of the bill was as follows:

1. That your Honors will restrain by injunction, preliminary until final hearing, and after final hearing perpetual, the Corporation of the Borough of Easton and the Town Council of said borough from constructing or providing public water works or from appropriating any money for the construction of the said water works and the said board of water commissioners from locating and constructing water works for the supply of the citizens of Easton with water.

2. A prayer for general relief.

After a hearing, the Court of Common Pleas refused the injunction, and dismissed the bill of complaint, and upon an appeal being taken to the Supreme Court of Pennsylvania, that Court affirmed the decree and dismissed the bill, at the costs of the plaintiff: (vide opinion of the Supreme Court of Pennsylvania, pages 14, 15, 16 and 17 of the record).

Whereupon the Lehigh Water Company took this writ of error.

ASSIGNMENT OF ERRORS.

1. The Court erred in affirming the decree of the Court of Common Pleas of Northampton County.

2. The Court erred in deciding as follows (page 15 of the Record):

"The grounds on which the water company seeks to "restrain the borough are: 1st, that under the act of "1874 the right of the water company is exclusive; "2nd, that the borough has no power, under the act of "1867, to construct water works; and, 3rd, that to do "so would contravene Article I, Section X of the Consti- "tution of the United States, which declares that 'no "state shall pass any law impairing the obligations of "contracts.' Neither of these positions can be sus- "tained."

3. The Court erred in deciding as follows (page 17 of the Record):

"The third ground of objection is wholly without "merit. By constructing water works of its own, the

"borough will not destroy the franchises of the plain-
"tiff company. It may impair their value, and probably
"will do so; but of this the company have no legal
"cause of complaint."

4. The Court erred in deciding as follows (page 17 of the Record):

"No contract has been shown between the water
"company and the state, by which the latter is pre-
"cluded from granting to the Borough of Easton the
"privilege of erecting works to supply its citizens with
"water."

5. The Court erred in refusing to grant the injunction prayed for in the bill of complaint.

6. The Court erred in dismissing the plaintiff's bill.

ARGUMENT.

ARGUMENT.

The first proposition we assert is that a charter of a corporation accepted by it is a contract, which the state can not impair or violate.

To sustain this proposition, we will first refer to the cases decided by the Supreme Court of the United States, affirming the doctrine for which we conten l, and then to cases decided by the highest courts of other states asserting the same doctrine, and to the enunciation of principles drawn by standard text enters from these decisions.

The case of Dartmouth College vs. Woodward, 4 Wheat, 712, although sometimes questioned, is now undoubtedly the law, and the principle established by it that a charter of a corporation accepted by it is a contract, which the state cannot impair or violate, is now too firmly settled to be called in question. Judge Story in delivering his opinion in this case says, "In my judg- "ment it is perfectly clear that any act of a Legislature "which takes away any powers or franchises vested by "its charter in a private corporation or its corporate "officers, or which restrains or controls the legitimate

"exercise of this, or *transfers them to other persons*, with-
"out its assent, is a violation of the obligations of that
"charter."

In Wilmington Railroad Company vs. Reid, 13 Wall. 266, Justice Davis in delivering the opinion says: "It "has been so often decided by this Court, that a char-
"ter of incorporation granted by a state creates a con-
"tract between the state and the corporation, which the
"state cannot violate, that it would be a work of super-
"erogation to repeat the reasons on which the argument
"is founded."

In Farrington vs. Tennessee, 75 U. S., (5 Otto,) 683, the Court say, "The constitutional prohibition applies alike to both executory and executed contracts, by whomsoever made. The amount of the impairment of the obligation is immaterial." And on page 685, alluding to Dartmouth College vs. Woodward, the Court say: "The question decided in that case has since been "considered as finally settled in the jurisprudence of "the entire country. Murmurs of doubt and dissatis-
"faction are occasionally heard, but there has been no
"re-argument here and none has been asked for. The
"same doctrine has been often reaffirmed in later cases."

In the Binghamton Bridge, 6 Wall, 73, this Court

said: "The constitutional right of one Legislature to grant corporate privileges and franchises so as to bind and conclude a succeeding one, has been denied. We have supposed, if any thing was settled by an unbroken course of decisions in the Federal and State Courts, it was, that an act of incorporation was a contract between the state and the Stockholders. All courts at this day are estopped from questioning the doctrine. The security of property rests upon it, and every successful enterprise is undertaken in the unshaken belief that it will never be forsaken. A departure from it *now* would involve dangers to society that can not be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, the respect which has always been felt for the judicial department of the government. An attempt even to reaffirm it, could only tend to lessen its force and obligation. It received its ablest exposition in the case of Dartmouth College vs. Woodward, which case has ever since been considered a landmark by the profession, and no court has since disregarded the doctrine, that the charters of private corporations are contracts, protected from invasion by the constitution of the United States."

The court then go on to say that enterprises beneficial to the country are often beyond the ability of individual enterprise, and the government fulfilling the duty

to provide for the public wants, says to public spirited citizens, "If you will embark, with your time, money and skill, in an enterprise which will accommodate the public necessities, we will grant you for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill." "Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it."

In the case of the New Orleans Gaslight Company vs. the Louisiana Light and Heat Producing Company, 115 U. S, page 650, this Court decided that the Legisture of Louisiana had authority to grant a private corporation the exclusive privilege of supplying gas to the city and people of New Orleans, and such grant constitutes a contract, the obligation of which can not be impaired by a state law.

This Court say in their opinion, page 665: "If the state can, by contract, restrict the exercise of her power to construct and maintain highways, bridges and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams

within designated limits; if she may restrict the exercise of the power of taxation, by granting exemption from taxation to particular individuals and corporations, it is difficult to perceive upon what ground we can deny her authority,—when not forbidden by her own organic law—in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health, or the public safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the state might undertake to perform either herself or by subordinate municipal agencies. The former adjudications of this Court, upon which counsel mainly rely, do not declare any different doctrine, or justify the conclusion for which the defendant contends."

In the case of the New Orleans Water Works Company vs. Rivers, 115 U. S., 674, this Court on December 17th, 1885, decided that "a legislative grant of an exclusive right to supply water to a municipality and its inhabitants, through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee, is a grant of a franchise vested in the state, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation to impair it.

"An exclusive franchise granted to supply water to the inhabitants of a municipality, by means of pipes and mains laid through the public streets, is violated by a grant to an individual in the municipality, of the right to supply his premises with water by means of a pipe or pipes so laid."

On page 682 this court says: "The permission given to the appellee by the City Council to lay pipes in the streets for the purpose of conveying water to this hotel, is plainly in derogation of the state's grant to the appellant; for if that body can award such an use of the public ways to him, it may grant a like use to all other citizens and to corporations of every kind, thereby materially diminishing, if not destroying, the value of the plaintiff's contract, upon the faith of which he has expended large sums of money, and rendered services to the public which might otherwise have been performed by the state or the city at the public expense.

In Louisville Gas Company vs. Citizens Gas Company, 115 U. S., 683, this Court decided that, "The legislative grant of an exclusive right to supply gas to a municipality and its inhabitants, by means of pipes and mains laid through the public streets, and upon condition of the performance of the service by the grantee, is a grant of a franchise vested in the state, in

consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation to impair it."

In the Court's opinion in this case, they comment upon the distinction to be made between corporations chartered to manufacture articles which may be indispensable to the general public, and the grant of a franchise of a public nature, and which is properly the subject of municipal control, and say, on page 693, that "as the distribution of gas is, for the reasons stated in the other case," (New Orleans Gas Company vs. Louisiana Light Company) "a matter of which the public may assume control, services rendered in supplying it for public and private use constitute, in our opinion, such public services as, under the Constitution of Kentucky, authorized the Legislature to grant to the defendant the exclusive privileges in question."

In Fletcher vs. Peck, 6 Cranch, 133, quoted as part of the text in Cooley's Constitutional Limitations, page 274, Ch. J. Marshall says: "A contract is a compact "between two or more parties, and is either executory "or executed. An executory contract is one in which "a party binds himself to do or not to do a particular "thing. Such was the law under which the conveyance

"was made by the Governor. A contract executed is "one in which the object of the contract is performed; "and this, says Blackstone, differs in nothing from a "grant. The contract between Georgia and the pur- "chasers was executed by the grant. A contract exe- "cuted, as well as one executory, contains obligations "binding on both parties. A grant in its own nature "amounts to an extinguishment of the right of the "grantor and implies a contract not to reassert that "right."

"A party is therefore always estopped by his own "grant, since then, in fact, a grant is a contract executed, "the obligation of which still continues and since the "Constitution uses the general term 'contract,' without "distinguishing between those which are executory and "those which are executed, it must be construed to "comprehend the latter as well as the former."

In Boston and Lowell Railway Corporation vs. Salem and Lowell, etc., reported in 2d Gray, 11, Shaw, Ch. J. says: "In Fletcher vs. Peck, 6 Cranch 135, the court "say where a law is in its nature a contract where abso- "lute rights have been vested under that contract, a "repeal of the law cannot divest those rights.' So any "law granting privileges to others repugnant to those "previously granted, which, if available, would be a re-

"peal by implication, is obnoxious to the same objection. "That which cannot be repealed in express terms, can- "not be repealed by implication, by the enactment of "laws repugnant to the provisions of the former act. "The same defect of power which invalidates the one, "has the same effect upon the other."

Judge Cooley in his Constitutional Limitations, page 279 states the following, as deduced from a series of decisions quoted by him in the note: "Those charters "of incorporation, however, which are granted, not as "part of the machinery of the government, but for the "private benefit, or purposes of the corporators, "stand upon a different footing and are held to be "contracts between the Legislature and the corpora- "tors, having for their consideration the liabilities and "duties which the corporations assume by accepting "them; and the grant of the franchise can no more be "resumed by the Legislature or its benefits diminished "or impaired without the consent of the grantees, than "any other grant property or valuable thing unless the "right to do so is recorded in the charter itself."

Judge Cooley also in a note on page 280, quotes with approbation the following from the opinion of the Court in Mills vs. Williams, 11 Iredell, 561: "The sub- "stantial distinction is this: Some corporations are cre-

"ated by the mere will of the Legislature, there being "no other party interested or concerned. To this party "a portion of the power of the Legislature is delegated, "to be exercised for the general good and subject at "all times to be modified, changed and annulled. Other "corporations are the result of a contract. The Legis- "lature is not the only party interested; for although "it has a public purpose to be accomplished, it chooses "to do so by the instrumentality of a second party. "These two parties make a contract. The Legislature "for and in consideration of certain labor and outlay "of money, confers upon the party of the second part "the privilege of being a corporation with certain power "and capacities. The expectation of benefit to the pub- "lic is the moving consideration on the one side, and "that of expected remuneration for the outlay is the "consideration of the other. It is a *contract*, and there- "fore cannot be modified, changed or annulled, without "the consent of both parties."

Wales vs. Stetson, 2 Mass., 146, "The right legally "vested in any corporation can not be controlled or de- "stroyed by any subsequent statute, unless power for "that purpose be reserved to the Legislature in the Act "of Incorporation."

Morawetz in his treatise on Private Corporations

sums up the principles deduced from these and other cases as follows:

SECT. 429. "We have seen that a charter is a contract, and therefore protected by the Constitution of the United States from *impairment* by state laws, for two distinct reasons, depending upon the twofold purpose which a charter fulfills. These are:

1. Because a charter constitutes a grant of franchises or privileges from the state to the corporators.

2. Because it contains the agreement which binds the several corporators together. If, therefore, a state law impairs the obligation of a charter with respect to either of these two purposes, it must be held to be unconstitutional and void."

SECT. 432. "If a privilege granted by the state is of such a character that it cannot be enjoyed by several parties at the same time, the state cannot impair its original grant by subsequently conferring similar privileges upon other parties."

SECT. 433. "A state may grant franchises to a corporation upon condition that the grantee shall assume certain duties or obligations. Under these circumstances the state cannot impair its grant by altering the condition subject to which the grant was made."

SECT. 436. "It may be stated as a general rule, that every law which impairs the obligation is unconstitutional, and that it is immaterial in such cases to what extent the contract has been impaired. A state cannot, by indirect means, avoid the application of a constitutional prohibition. Any law whose operation would impair the obligation of a contract is unconstitutional, though it profess to leave the contract unimpaired."

Citing Green vs. Biddle, 8 Wheat, 84; Von Hoffman vs. Quincy, 4 Wall, 551, 554; Farrington vs. Tennessee, 95, U. S., 683.

This principle is older than any of the American decided cases, as Blackstone in the 2d volume of his Commentaries chap. 3, page 36, says: "The same identical "franchise that has been before granted to one cannot "be bestowed on another, for that would prejudice the "former grant."

Mr. Madison in the Federalist, paper No. 44, says: "Bills of attainder, *ex post facto* laws and laws impair- "ing the obligations of contracts, are contrary to the "first principles of the social compact and to every "principle of sound legislation. The two former are "expressly prohibited by the declarations prefixed to "some of the State Constitutions and all of them are

"prohibited by the spirit and scope of these fundamen-
"tal charters. Our own experience has taught us,
"nevertheless, that additional fences against these dan-
"gers ought not to be omitted. Very properly there-
"fore, have the convention added this constitutional
"bulwark in favor of personal security and private
"rights; and I am much deceived if they have not in
"so doing, as faithfully consulted the genuine senti-
"ments as the undoubted interests of their constituents.
"The sober people of America are weary of the fluctu-
"ating policy which has directed the public councils.
"They have seen with regret and indignation that
"sudden and legislative interferences, in cases affecting
"personal rights, become jobs in the hands of enterpris-
"ing and influential speculators; and snares to the more
"industrious and least informed parts of the commun-
"ity. They have seen too that one legislative inter-
"ference is but the first link of a long chain of repeti-
"tions; every subsequent interference being naturally
"produced by the effects of the preceding."

These authorities clearly establish the proposition we enunciated at the beginning of our argument. The application of it to the present case, we will discuss as follows:

I. Is the charter of the Lehigh Water Company such

a contract between the state and the company as is protected by the provisions of the 10th section of article I of the Constitution of the United States?

II. Does the present charter of the Lehigh Water Company give the company an exclusive right to supply the Borough of Easton with water?

III. Did the passage of the act of 1867 authorizing the erection by the corporation of the Borough of Easton of a water works, the laying of pipes in the streets and the supply of the citizens with water impair the obligation of such a contract?

In coming to a proper conclusion in answer to these three propositions, it will be necessary to recapitulate the principal facts in its history.

The company was chartered in 1860, and acquired by purchase, in accordance with the provisions of the law creating it, the property and franchises of the West Ward Water Company incoporated in 1854, and the Easton Water Company incorporated in 1817, and became subject to all the obligations imposed by law on those two companies. These obligations were as follows:

1. To furnish a supply of pure and wholesome water

to all the citizens of said borough, and to lay pipes in all the streets and alleys, and to receive a compensation therefor which was to be regulated by three water commissioners elected by the citizens of the borough.

2. To furnish an adequate supply of water for the extinguishment of fires and the supply of a fountain *free of charge.*

3. To erect fire plugs from which water was to be supplied for extinguishment of fires, also *free of charge.*

4. To invest in trust for the Borough of Easton all the net earnings of the company, in excess of ten per centum upon their capital stock, until the amount so invested equals the actual cost of the erection of the works, when the company were to accept the same and transfer all their rights and property to the Corporation of the Borough of Easton.

The Court will observe that the charter of the Lehigh Water Company bound that company to fulfill all the duties imposed by their charter upon the Easton Water Company and the West Ward Water Company, and that the charter is not the usual one granted to improvement companies, which requires but little from the corporation in return for the grant of its franchises. But

it was made subject to onerous conditions, which required the expenditure of large sums of money, for which the corporation would receive no return, and finally the obligation to transfer their entire property to the borough if it proved a profitable enterprise. The company accepted the charter subject to these obligations, and expended nearly or quite $200,000 in erecting water works and laying pipes; and thus a contract as defined by Judge Cooley was created, "the consideration of the contract "between the Legislature and corporators being the lia- "bilities and duties which the corporators assume by "accepting them."

This contract was not only accepted by the Lehigh Water Company, but it was also ratified and confirmed by the Borough of Easton, which compelled the company, by proceedings in the courts, to fulfill one of its most important obligations, viz., the erection of twenty-six additional fire plugs.

It would seem to us, therefore, that the first of our propositions above stated must be answered affirmatively, and that a contract does exist between the state and the company, which is protected by the Constitution of the United States.

2. Is this an exclusive right?

The Court will find in the *statement of facts*, page 9, that the Legislature of Pennsylvania, after the adoption of the new constitution, passed a general law, the text of which will be found in the appendix, page 40, under and by virtue of which, corporations for supplying water and gas heretofore erected under special acts, upon acceptance of the provisions of the constitution and of that act "shall be entitled to all the *privileges, immunities,* "*franchises and powers* conferred by the act upon corporations to be erected under the same." A subsequent section of the same act provides that, "the right to have "and enjoy the franchises and privileges of such cor- "poration within the district or locality covered by "its charter SHALL BE AN EXCLUSIVE ONE."

Upon the faith of this act, on June 21, 1880, not only before the borough had accepted the provisions of the act of 1867 or exercised any of the powers or privileges granted by this act, but after the citizens at *intervals of twelve years* had twice decided not to erect water works, the water company accepted the provisions of the act of 1874, which secured to it "*all the privileges,* "*immunities, franchises and powers conferred upon cor-* "*porations to be created under the same.*

3. There being a contract, is it impaired by the Legislature authorizing the borough corporation to erect works?

The verb *impair* is defined by Webster to mean "to "make worse; to diminish in quantity, value, excellence "or strength; to lessen in power; to weaken; to en- "feeble; to deteriorate." It is derived from the Latin, through the French, from *im* and *pejoro*; the verb *pejoro* being derived from the comparative of the adjective *malus, pejor*, which means "evil, injurious, destructive, mischievous."

If, therefore, by the construction of water works by the Borough of Easton, the franchises and works of the water company should be diminished in value, it is manifest that the Legislature, by its grant to the borough to erect such works, has impaired the obligation of the contract between the state and the company.

It seems to us almost unnecessary to argue to this Court that if the borough constructs works, the value of the works of the company will be greatly diminished, if not totally destroyed. The revenue to be derived from the sale of water to the citizens was the only return which the water company could possibly have for its outlay of money in constructing its works. Even the competition of another company in the same territory would be less likely to be injurious to the company than the municipality itself, which every citizen would be interested to patronize, in order to make the investment of the borough profitable and thus diminish his

taxes. The Supreme Court of Pennsylvania recognized this as a fact, when they say in their opinion "It may impair their value and probably will do so."

We think, therefore, we must have satisfied the Court that our three propositions are sustained by authority, and that the charter of the Lehigh Water Company was—

1. A contract which cannot be impaired.
2. That its right is exclusive.
3. That the legislation of 1867 impaired the contract.

If we are correct in our positions, we think we are entitled to the relief asked for in our bill of complaint, and that the Supreme Court of Pennsylvania were in error when they refused relief.

It remains now to consider the reasons given by that Court in their opinion (to be found on page 14 to 17 of the Record,) for refusing relief and dismissing our bill.

They say as follows: "The third ground of objection" (that it is in conflict with Article I, Section 10, of the Constitution of the United States,) "is wholly without merit. By constructing water works of its own, "the borough will not destroy the franchises of the "plaintiff company. It may impair their value, and "probably will do so; but of this the company have

"no legal cause of complaint. The granting of a new "charter may sometimes render valueless the franchises "of an existing corporation; but unless the state by con- "tract has precluded itself from such new grant, the "incidental injury can constitute no obstacle. No con- "tract has been shown between the water company and "the state by which the latter is precluded from grant- "ing to the Borough of Easton the privilege of erecting "works to supply its citizens with water."

It appears to us that the statement of the learned Court is in conflict with all the cases cited, not only those decided by the Supreme Court of the United States and the highest Courts of other states, but by the Supreme Court of Pennsylvania itself.

In the Iron City Bank vs. Pittsburg 37 Pennsylvania State Reports, 345, Judge Woodward in delivering the opinion refers to the Dartmouth College case as follows:

"For many reasons this may be considered one of "the most important judicial decisions that has ever "been pronounced in this country. Though often ques- "tioned, it has been generally followed, and the doc- "trine may be now regarded as settled, in every state "of the Union that an act of incorporation, accepted "and acted upon by the corporators, is a contract, be-

"tween the state and the corporators which a subse-"quent Legislature may not impair." "All the cases" on this subject" said Judge Black in the Bank of Pennsylvania vs. The Commonwealth, 19 Pennsylvania State Report, 151, "are saturated with this doctrine. It "is sustained, not by a current but by a torrent of "authorities. No judge who has a decent respect for "the principle of *stare decisis*—that great principle "which is the sheet anchor of our jurisprudence—can "deny that it is immovably established."

In Commonwealth vs. Pottsville Water Company, 94 Pennsylvania State Report, 516, the Court say: "It is "well established law, that an Act of Incorporation is "a contract between the state and the stockholders." And in Chincleclamouche Lumber Company vs. Commonwealth, 100 Pennsylvania State Report, 438, Judge Trunkey in delivering the opinion of the Court says: "A grant of a corporate franchise by an act of legisla-"tion, accepted by the grantee, is a contract between "the state and the grantee, the obligation of which a "subsequent Legislature cannot impair. This is settled "by numerous decisions of the Courts of this state and "of the United States."

The Supreme Court of Pennsylvania have apparently fallen into the error of assuming, that inasmuch as the

works of the Lehigh Water Company will not be "*destroyed*," but their value only be "*impaired*" or their franchise "*rendered valueless*," that there is therefore no infringement of the constitutional prohibition; and that the state has not by "*contract*" "*precluded itself from a new grant.*"

It is very plain "that these statements are in direct conflict with what Judge Black calls "*the torrent of authorities*" upon the subject. The Court seem to ignore the principle stated by Judge Cooley and derived from the decisions of this Court, that such charters of incorporations "*are taken to be contracts between the Leg-*
"*islature and the corporators*, having for their consid-
"eration the liabilities and duties, which the corpora-
"tors assume by accepting them; and the grant of the
"franchise can no more be resumed by the Legislature
"or its benefits *diminished or impaired without* the con-
"sent of the grantees, than any other grant of property
"or valuable thing, unless the right to do so is recorded
"in the charter itself."

In somewhat different language, this Court asserted the same principle in the recent case of Louisville Gas Company vs. Citizens Gas Company, *supra*, and say that such a grant of a franchise is "in consideration of the "performance of a public service, and *after performance* "*by the grantee*, is a CONTRACT protected by the Consti-

"tution of the United States against state legislation "to impair it."

We can not add to the strength, force or perspicuity of this emphatic language, nor is it necessary to do any more then to examine the facts, which we have heretofore stated, to demonstrate that this company's charter is just such a contract as is described, that its consideration was the performance of a public service, viz., the building of works and the supplying of the town with water, that this service *was performed*, and having been performed before the act of 1867, it was *a contract* protected by the Constitution of the United States against legislation by the State of Pennsylvania to impair it.

Another ground upon which the Court dismissed our bill is, that although after accepting the provisions of the act of 1874, our right might have been exclusive as against any other water company, yet that the provision was not intended to prevent a city or borough from erecting water works.

The Pennsylvania statute, which this company accepted, provides as follows:

"The right to have and enjoy the franchises and privi-"leges of such incorporation within the district or lo-"cality covered by its charter *shall be an exclusive one.*"

In the first place the constitutional provision protect-

ing contracts from impairment applies with as much force to *municipal* corporations, as it does to improvement companies or any species of private corporation. The principle of the cases is, that when a state has chartered a company and it has accepted its charter and performed the duties and liabilities imposed upon it, it is a contract between *the state* and the corporation, which the Legislature of the state cannot afterward impair. It could no more grant a right to impair it to a municipal corporation than to any other. The prohibition of the constitution is against its *impairment* by any body, in any manner, and there is no exception in favor of municipal corporations. The Legislature in its act of 1874 provided a method by which companies might be incorporated to introduce gas and water into towns. Under it any number of persons not less than five might form companies, that would be subject to all the conditions and obligations which the act imposed, and when they became incorporated under the act, their franchises and privileges within the district or locality covered by their charter was *an exclusive one.* It would certainly be held that such a charter was a contract between the state and the company.

By the same act, it was provided that corporations for any of the purposes named "*created by any special act* "or in existence under the provisions of any general law

"of this commonwealth, upon accepting the provisions "of the constitution and of this act, by writing under "the seal of said corporation, duly filed in office of the "Secretary of the commonwealth, *shall be entitled to all "the privileges, immunities, franchises and powers con-"ferred by this act.*"

A corporation chartered by special act, as this was, having accepted the provisions of the constitution and of this act, as this company did in 1881, had therefore precisely the privileges, franchises and powers which a corporation would possess which was incorporated under the act of 1874, one of which was the exclusive right to introduce water into the Borough of Easton.

But the Court say, (page 16 of Record,) "aside from "this, the water company claims this exclusive right by "reason of the act of 1874, while the right of the bor-"ough to construct the works was conferred by the "prior act of 1867, and there is no pretence that the "one repeals the other."

The acts authorizing the borough to construct works are to be found in the appendix, pages 32–39.

The act of March 12, 1867, authorized the borough to construct water works. The supplement passed April 15, 1867, provided that the qualified voters of the borough should have the right to determine by vote the

expediency of constructing water works and authorized the borough council to call a special election for the purpose. The act further provides that "in case the majority shall pronounce against the same, all proceedings under the act may be suspended until the citizens determine hereafter, at some spring election, to carry out its provisions."

In 1868 the election was held in accordance with the act, and a majority of voters determined against the expediency of erecting water works.

No further proceedings were had under the act of 1867 until the spring election of 1880, when a majority of the citizens again determined against the expediency of erecting water works. The same year, 1880, on June 21, the Lehigh Water Company accepted the provisions of the new constitution and the act of 1874, under which, according to the letter of the statute, it became entitled to an exclusive right in the Borough of Easton.

Putting out of view the question whether the original charter of the company, granted long before the acts of 1867 were passed, was not an inviolable contract between the state and the company, are the Court right in their view, that the borough has a right paramount to that of the water company, because the act of 1867 was prior to the act of 1874 and the act of 1874 did not repeal the act of 1867?

The authorities we have already quoted are clear that a statute *accepted by the corporators* becomes a contract, which can not be impaired by a subsequent Legislature. But the borough refused to accept the provisions of the acts of 1867 until after the water company had accepted the provisions of the act of 1874, and the water company's rights had become vested under that act. The acts of 1867 were a mere offer by the state to the Borough of Easton to contract with it, and until the borough accepted the provisions of the act, no contract existed. The Corporation of the Borough of Easton was *quoad hoc* a private corporation.

In Bailey vs. Mayor of New York, 3 Hill 531, Chief Justice Nelson in delivering the opinion says:

"If a grant is made to a municipal corporation for "the purpose of private advantage and emolument, "though the public may derive a common benefit there-"from, the corporation *quoad hoc* is to be regarded as a "private company. It stands on the same footing as "any individual or body of persons upon whom like "special franchises had been conferred."

This case is quoted with approbation and the same doctrine recognized in Western Saving Fund Society vs. The City of Philadelphia, 31 Pennsylvania State Report, 183. Chief Justice Lewis delivered the opinion

in 1854 and says: "But the contracts which a municipal corporation may make for the purpose of supplying the inhabitants with gas-light in their streets and houses, relate to 'things of commerce' as distinguished in the civil law from the 'things public,' which are regulated by the sovereign. Such contracts are not made by a municipal corporation, by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gas-light is no more a duty of sovereignty than the supply of water. Both of these objects may be accomplished through the agency of individuals or of private corporations and in very many instances are accomplished by those means. If this power is granted to a borough or city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city as much so as the lands and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well settled distinction and the process of separation is not rendered impossible by the confusion. In separating them regard must be had to the object of the Legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for private advantage and emolument,

"though the public may derive a common benefit there-
"from, the corporation *quoad hoc*, is to be regarded as
"a private company. It stands upon the same footing
"as would any individual or body of persons upon
"whom the like special franchise had been conferred.
"These principles are well enforced by Chief Justice
"Nelson, in delivering the opinion of the Supreme Court
"of New York, in the case of Baily vs. The City of
"New York, 3 Hill, 538. In that case the acts of the
"city had relation to the construction of water works.
"In this they have relation to gas works. But the prin-
"ciple is precisely the same in both cases."

The same case came before the Court again in 1858, 31 Pennsylvania State Report, 185, and Judge Strong then delivered the opinion of the Court, and says as follows:

"Nor can there be any doubt that the trust existing
"in the trustees is a private one and that the city of
"Philadelphia is to be regarded as a private corpora-
"tion, so far as relates to its contract with the loan
"holder. It was not as a municipality that it dealt with
"them. As a local sovereign it had no authority to
"enter into the business of manufacturing and selling
"gas, for its sovereignty did not extend to such subjects
"any more than it did to almost any other manufacture.
"It is true, a municipal corporation is not bound by any

"arrangement which prevents a discharge of the duties "imposed upon it by its organic law for the plain reason "that such engagements are contrary to law. But when "such a corporation engages in things not public in "their nature, it acts as a private individual, no longer "legislates, but contracts, and is as much bound by its "engagements as is a natural person. The distinction "between public duties and private business is a wide "and obvious one. It is, perhaps, nowhere better stated "than by Nelson, C. J., in Bailey vs. The Mayor of New "York, 3 Hill, 531."

The authority of this case is recognized and its principles re-affirmed in Wheeler vs. Philadelphia, 77 Pennsylvania State Report, 354, in which case Judge Paxson, in delivering the opinion, says: "The most that can be "argued is, that the city is acting in a double capacity; "in the one exercising the rights of sovereignty, in the "other performing the functions of a private corpora- "tion in the manufacture and sale of gas. This was the "view taken by this Court in the Saving Fund cases "above cited."

The Borough of Easton was therefore in the position of a private corporation *quoad hoc*, and if it did not accept the provisions of a law authorizing it to build works, until after the state had given the exclusive

privilege to the Lehigh Water Company to supply water to the town, the borough lost the right which it might have secured by accepting the provisions of the act of 1867.

But further than this, the learned Justice of the Supreme Court of Pennsylvania says:

"The water company claims this exclusive right by reason of the act of 1874, while the right of the borough to construct the works was conferred by the prior act of 1867, and there is no pretence that the one act repeals the other."

We not only pretend, but assert positively and distinctly that the passage of the act of 1874 by the Legislature of Pennsylvania, and the acceptance by the Lehigh Water Company of the provisions of the act effected and implied repeal of the acts of 1867, conferring upon the Borough of Easton the right to erect water works.

Let us first look at the legal principles which govern the repeal of statutes by implication, and then at the facts in this particular case.

The canon of construction enunciated by Blackstone, that a new statute repeals the old one, if the two are repugnant and inconsistent, has been the guide of the Courts both in this country and in England.

The decisions of the Supreme Court of Pennsylvania are in full accord with the decisions of this Court on the subject, and therefore, for the purposes of this argument, the citations of the following Pennsylvania authorities will be sufficient.

In Johnson's Estate, 33 Pennsylvania State, 513, Justice Woodward said:

"This comparison of the two acts shows that in all "essential particulars they are inconsistent with each "other, and therefore the latter repeals the former. It "has been said, that a subsequent statute revising the "whole subject matter of a former one, and evidently "intended as a substitute for it, although it contains no "express words to that effect, must, on the principles "of law, as well as in reason and common sense, operate "to repeal the former;" by Dewey, J. in Bartlett vs. King, 12 Mass., R. 546; he refers himself to King vs. Cater, 4 Burr, 2026, and King vs. Davis, 1 Leach Cases 306, which are the same authorities on which Judge King ruled the case of Commonwealth vs. Crowley, 1 Ash. 182.

In Somerset and Stoystown Road, 74, Pennsylvania State Report, 61, Sharswood, Justice, said:

"A subsequent affirmative statute is a repeal by im-

"plication of a former one made concerning the same "matter, if it introduces a new rule upon the subject "and is evidently intended as a substitute for the for- "mer law."

"Every affirmative statute is a repeal of a precedent affirmative statute, where its matter necessarily implies a negative * * * and the repugnancy is such that the two cannot be reconciled.

Regina vs. Inhabitants of St. Edmunds, 2, Q. B. Rep. 84.

The Lehigh Water Company on June 21, 1880, accepted the provisions of the act of 1874, and were then in precisely the position of a corporation newly chartered under that act.

What inconsistency or repugnancy is there between the act of 1867 and that of 1874.

The act of 1874 contains this provision:

"The right to have and enjoy the franchises and privileges of such incorporation within the district or locality shall be *an exclusive one.*

Here is an inconsistency and repugnancy which is utterly and absolutely irreconcilable with the exercise

of the privileges conferred upon the Borough of Easton by the act of 1867.

The act of 1874, when its provisions were accepted by the water company, gives it the exclusive right, and yet it is seriously contended that the borough, because it is a borough, can exercise the right to construct works under the authority of a prior act of Assembly.

Surely "the right to have and enjoy an exclusive privilege" is a mere empty form of words, if at the same time another corporation can compete with, and probably completely absorb the business of the company. It is not said that their right shall be exclusive as to any other private corporation but that it is *exclusive*. There ought to be no doubt as to what that means.

But further than this, the subsequent provisions of the act of 1874, clearly show that the intention of the Legislature was to furnish a substitute for the act of 1867 and all similar acts.

Prior to the adoption of the constitution of 1873, the statute books of Pennsylvania had become burdened with an immense mass of special and local legislation. Laws were introduced and passed for every conceivable purpose. The abuses of this system led to the popular demand for some method of staying this torrent of loose legislation, which was likely, instead of maintaining the rights of the people, to accomplish their destruction.

The Constitutional Convention was called, and they incorporated into the article on legislation the most rigid and stringent rules with reference to local or special legislation.

A glance at the 3d article of our constitution and the enumeration in section 7, of the various kinds of special legislation therein prohibited, indicates the temper of the framers of the instrument, and by a parity of reasoning, its adoption by the people in 1874, also reflects the popular demand for the correction of the evil.

At this same election, the Legislature which enacted the act of 1874 under discussion, was chosen.

We may therefore, with perfect propriety, assume that the legislators were imbued with the spirit of the age and designed by their statutory enactments to promote the reforms which the constitution outlined and suggested.

Bearing this in mind, the purpose of the clause 7, of the 34th section of this act, appendix, page 40, becomes clearly apparent.

"It shall be lawful at any time after twenty years "from the introduction of water or gas, as the case may "be, into any place as aforesaid, for the town, borough "or city in which said company shall be located, to be-"come the owners of said works and the property of

"said company, by paying therefor the net cost of erect-
"ing and maintaining the same, with interest thereon,
"at the rate of ten per centum per annum, deducting
"from said interest all dividends theretofore declared;
"*Provided*, That nothing in this section contained shall
"authorize a company incorporated under the provis-
"ions of this act, to construct gas or water works within
"the limits of any municipality, when gas and water
"works *shall have been constructed* by said municipality,
"without the lawful consent of the corporate authori-
"ties thereof."

Compare this section with the act of March 12, 1867, and it is obvious that the purpose and design of the Legislature was to provide a general act as a substitute for all acts of a special nature relating to cities and boroughs.

This tendency to general legislation and to the provision of general laws to supplant and do away with the old method of accomplishing every thing by a special act of Assembly, manifested itself repeatedly in the enactments of this very legislature, and especially in legislation with reference to municipal corporations. Prior to 1874, all cities were incorporated under special acts. This same Legislature provided a general act for the incorporation of cities, and no city can now be incorporated, except under its terms. This is not there-

fore an isolated instance, but the statute book furnishes abundant instances in which this very design is clearly indicated.

This general act is clearly inconsistent with and repugnant to the act of 1867. In the act of 1874, the borough can only purchase after twenty years; in the act of 1867 it can purchase at any time; in the act of 1874, the borough must pay the net cost and ten per centum per annum, less the dividend, while in the act of 1867, they need only pay six per cent. These differences cannot be reconciled. The Lehigh Water Company, relying upon this theory, that the new law repealed the old one, accepted its provisions, made expenditure of its capital; erected a new and expensive pumping works and now asks that it be protected in the enjoyment of its rights.

Further than this, the proviso of this section in express words excepts those municipalities which shall *have constructed* water works. Obviously this municipality to which the privilege had been granted, but which had failed to exercise it by erecting works—yea, more,—which had by popular vote refused twice in elections, twelve years apart, to exercise the privileges, was regarded as having forfeited it, and the borough cannot now seek to place itself in the category of those municipalities which are actually in the exercise of the privileges.

It is therefore no forced or strained construction of this act to declare that it effects an implied repeal of the special act of March 12, 1867, and that the Borough of Easton can only obtain a municipal water works under the provisions of the act of 1874.

We assert also, that there is another reason why the Borough of Easton cannot exercise the special privilege conferred upon it by the acts of 1867.

By the first section of Article XVI, of the constitution of 1873, it is provided that: "All existing char-"ters or grants of special or exclusive privileges, under "which a *bona fide* organization shall not have taken "place and business commenced in good faith, at the "time of the adoption of this constitution, shall there-"after have no validity."

That this act of 1867 was a grant of a special privilege to the Borough of Easton; that the Borough of Easton refused to exercise the privilege prior to the adoption of the constitution; that there were no borough water works constructed or even in process of construction; that nothing was done which would in any way indicate an intention to exercise the privilege; that no "business had been commenced in good faith," are facts which are undisputed.

Why, then, does not this section apply?

The learned Judge who wrote the opinion of the Supreme Court of Pennsylvania, says:

"The 16th Article of the constitution has reference "to 'private corporations,' and it is to such corporations "alone that the first section applies. It was intended "to extinguish a vast number of charters obtained for "speculative purposes, under which 'a bona fide organ- "ization' had not taken place, nor 'business been com- "menced in good faith,' but which were being hawked "about to the manifest shame of the commonwealth. "No one ever supposed that this article was intended "to repeal an Act of Assembly, conferring additional "powers upon a municipal corporation, for the mere "reason that the power had not been exercised."

With all deference to the learned and distinguished jurist, we challenge his statement, that Article 16 of the constitution applies only to "private corporations," and think this Court can be readily convinced that such is not the fact.

The learned Judge was probably misled by the fact, that in the copy of the constitution as printed in the Pamphlet Laws, this article is headed "Private Corporations." An extended and exhaustive examination of the Debates of the Constitutional Convention fails to show that any such title to the article was ever adopted by the convention.

Further than this, the Debates show that the article as originally reported to the convention, was given the title "Corporations," (vide Debates of Constitutional Convention, volume 4, page 191,) so that the proper caption for this article is simply "Corporations,' and not "private corporations." The 13th section of the article defining the term "corporations," was originally reported as the first section and would probably have retained its original and proper position had it not failed on first reading. It was subsequently incorporated in the article. The convention certainly knew whether they were defining "corporations" or "private corporations." That the term "corporations" includes municipal corporations would seem too plain for argument. Substantially the same question was raised however, in Wheeler vs. The City of Philadelphia, 77, Pennsylvania State Reports, 338, with reference to section 3 of Article V of the constitution. In that instance, simply the word "corporations" was used. Chief Justice Agnew said:

"If it were the intention of the convention to restrict "the power of injunction to *private* corporations, it was "absolutely necessary to say so, or else by every rule "of sound interpretation the power exists as to corpora- "tions generally. It has been argued that the new con- "stitution distinguishes between public and private "corporations in other sections, referring sometimes to

"cities and counties, and sometimes to railroads and "other private corporations. This however, furnishes "no argument that the word "corporation" as *nomen* "*generalissimum* was intended to be restricted to pri- "vate corporations * * * The single question is, "did the convention mean to confine our original juris- "diction to private corporations? It did not say so, and "there is no reason to infer an intention expressed by "no appropriate language."

Were we without any other light upon this point, the reasoning of the learned Judge just quoted seems so clearly applicable to the question under discussion that we might safely rest here.

But there are evidences in the 16th Article itself which repel the idea that it applies only to private corporations and excludes municipal corporations.

Section 6 provides that "*no corporation* shall engage "in any business other than that authorized by its "charter."

Section 7, that "*no corporation* shall issue stocks and "bonds except for money, labor done, or money or pro- "perty actually received.

Section 8, that "*municipal* and other corporations "and individuals invested with the privilege of taking

"private property for public use, shall make just com-
"pensation for property taken, injured or destroyed."

Section 13, that "the term '*corporations*' as used in "this article shall be held to include all joint stock "companies.

A Constitutional Convention composed of the ablest lawyers in the state would certainly never be so careless in its use of terms as to use the word "corporation" when it meant only "private corporation," or when it was treating one species include every species by the use of a generic term.

The learned Justice says: "no one ever supposed that this first section applied to municipal corporations." That may be a cogent argument in support of his position but we fail to apprehend its force. It is purely a question of construction and there is no room for supposition.

We say that if the convention meant only private corporations they should have said so. As they did not, but used the term corporations, this clause effects corporations of every class.

The Debates of the Constitutional Convention are, of course, of value in determining what the intention of the framers of instrument was—perhaps of even greater value than the deliverances of the Supreme Court after

the adoption of this instrument. When this section was under discussion, it clearly appears that there was no thought of restricting the application of this clause to private corporations. In course of debate Mr. Clark said:

"In order to embrace all charters for corporations as "well as all grants to private individuals, of special and "exclusive privileges, we (the committee,) have em- "bodied both expressions in the section * * * A man could not organize himself, to be sure, in the case supposed; he has no organization to make; but he can proceed to the enjoyment of the right which has been granted to him by the Legislature; and that is what is meant."

Can it be said that when we ask that this section be applied not to the grant of a special privilege to an individual—but to a municipal corporation—that this was not contemplated by the framers of the constitution? Surely not.

This suggests another error into which the learned Judge apparently fell. He evidently lost sight of the fact that "grants of special and exclusive privileges" as well as "charters" were mentioned. He makes both clauses, a "bona fide organization" and "business been commenced in good faith," relate to the charters,

whereas, our reading of it would make the latter clause apply to the grants of special and exclusive privileges. That this is the correct reading, the remarks of Mr. Clark above quoted would seem to leave no room for doubt.

The Borough of Easton could not "organize" as an evidence of its good faith, for it was for all municipal purposes already organized, but it could have "commenced business in good faith" and its failure to do so makes the grant of this special privilege void and inoperative.

If we did not regard this as conclusive, we might add, that even admitting that this article applies only to private corporations, still this section would apply to this special privilege granted to the Borough of Easton.

We have already shown that municipal corporations act in a dual capacity. They are for some purposes regarded as public corporations and for some purposes as private corporations. This power conferred upon the Borough of Easton by the acts of 1867, was entirely foreign to it in its municipal character. The erection of a water works and the supply of its citizens with water was no part of its franchise as a municipal corporation. The very fact that it was necessary to pass a special Act of Assembly conferring this privi-

lege places that beyond dispute. *Quoad hoc* it is to be regarded as a private corporation, (Vid. authorities cited on pages 29, 30 and 31 of this Brief). As a private corporation, under this section of the constitution, it forfeits its special privilege, because on the adoption of the constitution it had done nothing in the way of exercising the privilege; it "had not commenced business in good faith."

Under every aspect of the case the injunction to restrain the Borough of Easton from the exercise of the special privilege should have been awarded, and its refusal by the Court below and the dismissal of the Bill in Equity was error.

EDWARD J. FOX,
EDWARD J. FOX, JR.,
Counsel for Plaintiff in Error.

APPENDIX.

APPENDIX.

AN ACT AUTHORIZING THE GOVERNOR TO INCORPORATE THE EASTON WATER COMPANY.

SECT. 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same*, That Nathaniel Michler, John Herster, John Green, James Hayes, William Barnet, George Wolf and Philip H. Mattes, or any four of them, are hereby appointed commissioners to do and perform the several matters and things hereinafter mentioned, that is to say, They shall, on or before the first day of May next, procure a book and enter therein as follows: We, the subscribers, promise to pay to the president and managers of the Easton water company, the sum of twenty-five dollars for every share set opposite to our respective names, in such manner and proportions, and at such times as shall be determined by the said company, in pursuance of an act of the General Assembly, entitled "An act authorizing the Governor to incorporate the Easton water company." Witness our hands

the day of in the year of our Lord one thousand eight hundred and seventeen." And shall thereupon give notice in one or more of the newspapers published in the borough of Easton, for the space of two weeks or more, when and where, within the said borough, the said book will be opened to receive subscriptions of stock; at which time and place one or more of the said commissioners shall attend, and shall permit all persons of lawful age, either in their own names or in the names of others when they shall appear to be duly authorized, to subscribe for any number of shares of the said stock, not exceeding four on the first day: and the said book shall be kept open for three successive days, unless four hundred shares shall have been sooner subscribed; and if within the said three days the four hundred shares shall not be subscribed, then the said commissioners, or the officers of the company after the same shall have been organized, may at any time afterwards open the book for the subscription of shares, until the whole number aforesaid shall be subscribed: *Provided,* That every person offering to subscribe in the said book in his own name, or the name of any other person, shall previously pay to the attending commissioners or officers two dollars for every share to be subscribed, out of which shall be defrayed the expense attending the taking of such subscriptions and other incidental charges, and the remainder shall be paid

over to the treasurer of the corporation, as soon as the same shall be organized and the officers chosen as hereinafter mentioned.

SECT. 2. *And be it further enacted by the authority aforesaid,* That when thirty or more persons shall have subscribed two hundred or more shares of the said stock, the commissioners shall certify, under their hands and seals, the names of the subscribers and the number of shares subscribed by each to the Governor of this Commonwealth, and thereupon it shall be lawful for the Governor, under his hand and the seal of the state, to create and erect the subscribers, and also those who shall afterwards subscribe, and their assigns, into one body politic and corporate, in deed and in law, by the name, style and title of "The Easton Water Company;" by which name the said subscribers shall have perpetual succession, and all the privileges and franchises incident to a corporation, and shall be capable of taking and holding the capital stock, and the increase and thereof, and of enlarging the same by new subscriptions, if it shall be found necessary to fulfill the intent of this act, and of purchasing, taking and holding to them, their successors and assigns, and of selling and transferring, in fee simple, or for any less estate, such lands, tenements, hereditaments aud estate, real or personal, as shall be necessary in the prosecution of their works, and of suing

and being sued, and of doing every matter and thing which a corporation or body politic may lawfully do.

Sect. 3. *And be it further enacted by the authority aforesaid,* That any three or more of the commissioners shall, as soon as conveniently may be after the letters patent are obtained, give at least ten days' notice, in one or more of the newspapers, printed in the borough of Easton, of the time and place for the subscribers to meet and hold an election for officers of the company; who shall choose, by ballot, from among the stockholders resident in the said borough, nine managers, to conduct the affairs of the company until the second Monday in May then next ensuing; and in all elections each stockholder shall be entitled to one vote for each share bona fide held by him, not exceeding five, and for every five shares above the first five and not exceeding twenty, one vote, and no stockholder shall be entitled to more than eight votes at any election; and the said managers shall appoint one of their number president of their board, who shall sign all contracts and certificates of stock; and the said president and managers shall appoint one of the stockholders residing in the said borough, and not being member of the board, treasurer of the company, and shall also have power to appoint such other officers and agents as may be necessary; and the elections for officers thereafter shall be held annually on

the second Monday in May, at such place within the said borough as may be appointed by the managers, of which at least ten days' notice shall be given in one or more of the newspapers printed in the said borough; and when vacancies happen, the managers shall supply them from among the stockholders until the next annual election: *Provided*, That no misnomer nor failure of election of officers on the day appointed, shall discontinue or dissolve the said corporation, but the managers and officers shall continue in office until a new election, which shall be made at such time and place within the said borough and after such notice as the board of managers may prescribe.

SECT. 4. *And be it further enacted by the authority aforesaid*, That the president and managers, or any five of them, shall have power to adopt such by-laws, rules and regulations as do not contravene the constitution of the United States or of this Commonwealth, and may be necessary or expedient for the well-governing the affairs of the company, and they shall also have power to call special meetings of the stockholders whenever any circumstances occur which may render it necessary to consult them.

SECT. 5. *And be it further enacted by the authority aforesaid*, That the president and managers shall pro-

cure a common seal, and the certificates of stock and other official acts shall be authenticated by affixing the same; and the president and managers shall procure certificates for all the shares of the stock of the said company, and shall deliver one such certificate, signed by the president, countersigned by the treasurer and sealed as aforesaid, unto each person for every share (held by him or her) as soon as ten dollars shall be paid on such share; and every such certificate shall be transferable, in person or by attorney duly authorized, in the presence of two credible witnesses, subject, however, to all payments due and to become due thereon, and the assignee holding any certificate, having first caused the assignment to be entered in a book of the company to be kept for that purpose, shall be a member of the corporation, and possess and enjoy all the rights, privileges, benefits and emoluments to which he would have been entitled if he had been an original subscriber.

Sect. 6. *And be it further enacted by the authority aforesaid,* That the president and managers shall meet at such times and places as shall be directed by their by-laws, and when met five members shall be a quorum, and in the absence of the president a chairman may be chosen of the number met, and all their transactions, as well as every matter and thing relating to the affairs of the corporation, shall be entered in a book or books to

be kept for such purpose; and a quorum being formed, they shall have full power to employ and contract with the engineers, artists and such workmen as they may deem necessary to carry on and complete their intended works, as well as to uphold, alter and repair the same, and also to fix the times and manner and in what proportion the stockholders shall pay the monies due on their respective shares, and to draw on the treasurer for all the monies that may be required to carry into full effect this act, or that may be required by their by-laws, rules and regulations, and generally to do all such other matters and things as by this act or their by-laws, rules and regulations they shall be authorized to do.

Sect. 7. *And be it further enacted by the authority aforesaid,* That it shall be the duty of the president and managers, as soon as may be after the company shall be organized, to proceed to bring and convey into the borough of Easton, by means of pipes, trunks, aqueducts, forcing pumps or other machinery, some spring or stream of water from the neighborhood of the said borough, the right to which shall have previously been vested in the said company, and also to provide proper cistern and reservoirs for the reception thereof, and for that purpose they may enter into such lands or enclosures as may be necessary, and to dig ditches and to lay pipes or trunks through the same, doing as little dam-

age as possible to private property, and paying for whatever injury shall be done by them, (when the parties cannot agree) according to an assessment made, under oath or affirmation, by three disinterested persons to be appointed, on application, by the court of common pleas in and for the county of Northampton; and the president and managers shall at all times (paying damages as aforesaid) have liberty to renew and repair the said pipes or trunks wherever laid; and shall also have liberty at all times to dig and lay pipes or trunks along roads and highways, and along the streets and alleys of the said borough, and to renew and repair the same, shutting up and amending any breaches which they may make as soon as possible; and it shall also be lawful for them to make cisterns or reservoirs in the streets or public ground in the said borough where the same may be deemed necessary.

Sect. 8. *And be it further enacted by the authority aforesaid,* That the said president and managers shall, in such streets or parts of the said borough where pipes shall have been laid, erect hydrants to be used solely for extinguishing fires, and they shall suffer individuals at all times to be supplied with water from the said pipes for domestic or manufacturing use, for such reasonable compensation as shall from time to time be agreed upon by the said president and managers and

such individuals, according to certain uniform rates which the said president and managers shall hereafter adopt, having regard to the probable quantity of water which applicants are likely to consume, and to their distance from the place whence the water is to be drawn; and any person within the said borough, who shall take any of the said water for domestic or manufacturing use, without having previously contracted for the same with the said president and managers, shall forfeit and pay for every such offence the sum of one dollar, to the said president and managers, to be recovered before a justice of the peace in the same manner as debts of equal amount are now recoverable; *Provided*, That nothing herein contained shall be construed to compel the inhabitants of the said borough to use the water so introduced by the said company, or to prevent them from using water obtained in any other way.

SECT. 9. *And be it further enacted by the authority aforesaid*, That the president and managers shall call in the capital stock of the company by installments, as the same may be required for the prosecution of the said work, and if any stockholder shall neglect to pay his installments after thirty days' notice published in one or more of the newspapers printed in the said borough, then payment thereof may be enforced as in other cases; and whenever the debts of the said company

shall have been paid, and the income shall exceed the expenses of the company, the president shall declare a dividend on the stock paid in, half-yearly, on the first Mondays of January and July of each year, and shall publish the said dividend and the place where the same will be paid, and shall cause the same to be paid accordingly.

Sect. 10. *And be it further enacted by the authority aforesaid,* That any person who shall wilfully destroy or injure, in any manner, the pipes, aqueducts, cisterns or reservoirs, hydrants, buildings or machinery, or any of them, or any of the works of the said company, erected in pursuance of this act, or shall wilfully corrupt or otherwise render unwholesome the spring or stream of water which shall be conveyed and brought into the borough of Easton by the said company, shall, on being thereof convicted before any justice of the peace in and for the county of Northampton, by the oath or affirmation of one or more credible witnesses, pay a fine not less than five nor more than twenty dollars, one-half to the use of the poor of said borough, and the other half to the informer, and shall moreover remain liable for all damages to the company.

Sect. 11. *And be it further enacted by the authority aforesaid,* That if the said company shall not proceed

to carry on the said work within three years after the passing of this act, or shall not within five years afterwards complete the same, so far as to have conveyed the water within the limits of the town of Easton, or shall issue any note or notes in the nature or manner of bank notes, or transact any business in the manner or nature of banking, in any of these cases all and singular the rights, liberties and franchises, hereby granted to the said company, shall revert to this Commonwealth.

REES HILL, *Speaker of the House of Representatives.*

ISAAC WEAVER, *Speaker of the Senate.*

APPROVED—the twenty-fourth day of March, one thousand eight hundred and seventeen.

SIMON SNYDER.

AN ACT TO INCORPORATE THE WEST WARD WATER COMPANY.

SECT. 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That Francis A. Gwinner, William Barnet, J. B. Odenwelder, H. M. Mutchler, Henry Keller, Melchoir H. Horn, Joseph Hiester, Thos. Bishop, Philip Johnson and W. H. Pomp be, and they are hereby appointed Commissioners, and authorized and empowered to establish a company to be called the West Ward Water Company, for the purpose of introducing into that portion of the borough of Easton, lying west of a newly laid out street, called Sitgreaves street, and into such portions of Forks township, as are adjacent, a supply of pure water for the use of the inhabitants of the same; and it shall be the duty of the said commissioners or a majority of them, to procure a book in which they shall enter as follows: We, whose names are hereunto subscribed, do promise to pay the West Ward Water Company the sum of twenty-five dollars for every share of stock in said company set opposite to our names, in such manner and proportions as shall

be determined on by the board of managers of said company. Witness our hands the day of Anno Domini one thousand eight hundred and fifty-four. The said book shall be kept open for the purpose aforesaid, for ten days, due notice being given, or until four hundred shares shall have been subscribed, but no subscription shall be valid unless the person so subscribing shall pay to the said commissioners at the time of subscribing two dollars and a-half on each share subscribed.

Sect. 2. When one hundred shares or more of said stock shall have been subscribed, and the sum of ten per cent. paid thereon, the commissioners or a majority of them, shall certify to the Governor, under oath or affirmation, the names of the subscribers, and the number of shares subscribed by each, and that ten per cent. has been paid thereon; the Governor shall by letters patent, under his hand and seal of the Commonwealth, create and erect the subscribers, and if the subscription shall not be full at the time, then also, those that shall thereafter subscribe to the number aforesaid, into a body politic and corporate in deed and in law, by the name, style and title of the West Ward Water Company, and by that name the subscribers shall have perpetual succession with all the privileges, franchises and immunities incident to a corporation, and be able to sue and be sued, to plead and be impleaded, in all courts of record

and elsewhere: *Provided,* That nothing herein contained, shall be so construed as in any way giving to the said corporation any banking or trading privileges whatsoever.

Sect. 3. That any five or more of said commissioners shall, as soon as conveniently may be after the letters patent are obtained, give at least two weeks' notice in two newspapers published in Easton, of the time and place for the subscribers to meet and hold an election of officers of said company, when such subscribers shall choose by ballot five managers, who shall be stockholders, to conduct the affairs of the company until the last Monday in January then next ensuing; and in all elections each stockholder shall be entitled to one vote for every share bona fide held by him; and the said managers shall appoint one of their number president of the board, who shall sign all certificates of stock; the president and managers shall have power to appoint a treasurer, secretary and such other officers and agents as may be necessary, and to take such security from their treasurer, for the faithful discharge of his duties, as they shall see proper; and the election shall be held annually on the last Monday in January, at such place as may be appointed by the managers, of which at least two weeks' notice shall be given in one or more newspapers published in said borough; and when vacencies happen,

the managers shall supply them from among the stockholders, until the next annual election: *Provided*, That no misnomer, nor failure of election of officers on the day appointed, shall discontinue or dissolve the said corporation, but managers and officers shall continue in office until a new election, which shall be made at such time and place, and after such notice, as the board of managers may prescribe.

SECT. 4. That the president and managers, or any four of them, shall have power to adopt such by-laws, rules and regulations, as may be deemed expedient for the well-governing the affairs of the company, and also shall have power to call special meetings of the stockholders whenever any circumstances occur which may render it necessary to consult them: *Provided*, That such by-laws, rules and regulations, shall in no wise contravene the constitution of the United States, nor of this Commonwealth.

SECT. 5. That the president and managers shall procure a common seal, and the certificates of stock, and other official acts, shall be authenticated by affixing the same; and the president and managers shall procure certificates for all the shares of stock of said company, and shall deliver one such certificate, signed by the president, and countersigned by the treasurer, and sealed

as aforesaid, unto each person, for each share held by him or her, as soon as the amount due thereon shall be paid; every such certificate shall be transferable in person, or by attorney duly authorized, in the presence of the president or treasurer of said company, in a book to be kept by the company for that purpose; and the assignee holding such certificate, shall be a member of the company, and possess and enjoy all the rights and privileges, benefits and emoluments, to which he would have been entitled if he had been an original subscriber.

Sect. 6. That the president and managers shall meet at such times and places as shall be directed by their by-laws, and when met a majority shall be a quorum, and in the absence of a president a president pro tempore may be chosen of the number met, and all their transactions, as well as every matter and thing relating to the affairs of the corporation shall be entered in a book or books to be kept for that purpose; and a quorum being formed, they shall have full power to employ and contract with the engineers, artists and such workmen as they may deem necessary to carry on and complete their intended works, as well as to maintain, alter and repair the same, and also to fix the times and manner and in what proportion the stockholders shall pay the monies due on their respective shares, and to draw on the treasurer for all the monies that may be required

to carry into full effect this act, or that may be required by their by-laws, rules and regulations, and generally to do all such other matters and things as by this act or their by-laws, rules and regulations they shall be authorized to do.

Sect. 7. That it shall be the duty of the president and managers, as soon as may be after the company shall be organized for the purpose of introducing water into said West Ward, to purchase and hold in fee simple, or for any less estate, any spring or springs, stream or streams of water, or any water power or powers near or convenient to said West Ward, or any lands, tenaments, or hereditaments to which any spring or springs, stream or streams of water, or any water power or powers may be appurtenant with full power, the same or any part thereof in the whole of their works, to grant, bargain, sell, alien, convey, mortgage, pledge, charge, encumber and devise, and dispose of at their will and pleasure, and shall convey said water into said West Ward and Forks township, by means of pipes, trunks, aqueducts or in such manner as they may deem most advisable and convenient, and should they find it necessary to provide proper cisterns or reservoirs for the reception thereof, and for these purposes may enter into such lands and enclosures as may be necessary, and to dig, ditch and lay pipe through the same, the company

doing as little damage as possible to private property, and the said president and managers shall at all times have liberty to renew and repair the pipes or trunks, cisterns or reservoirs wherever laid or constructed on and through private property, doing as little damage as possible, and shall also have liberty at all times to dig and lay pipes and trunks along roads and highways and streets of the said West Ward and Forks township, lying west of Sitgreaves street as described in the first section of this act, and to renew and repair the same, shutting up and amending any breaches which they may make as soon as possible.

Sect. 8. That the said West Ward Water Company shall from time to time and at all times furnish water for the extinguishment of fires free of charge to the borough, at points and places along improved property supplied with water by said company: *Provided*, That the town council of the said borough shall be at the expense of erecting and keeping in repair fire plugs, at the point and places above designated, and the said water company is authorized to supply individuals and corporations with water for family and other purposes, for such compensation as may be agreed upon between the said company and individuals or corporations, or according to the rates adopted by the said company.

Sect. 9. That the president and managers may call

in the capital stock by instalments as the same may be required, and if any stockholder shall neglect to pay after thirty days' notice published in one or more newspapers in said borough, payment may be enforced by action of debt in the corporate name of said company against such delinquents as in other cases, and in case of inability to collect such instalment or instalments, said company may declare said delinquent stock and the money paid thereon forfeited for the use of the company, the president and managers shall declare dividends on the amount of stock paid in at such times as they may deem meet and proper.

Sect. 10. That in case the owner or owners of any lands, through and upon which such ditch, pipe, trunks, aqueducts, reservoirs and cisterns are laid and constructed, or the owner or owners of land upon which it may be found necessary to enter, for the purpose of digging, taking and carrying away clay, gravel or other materials necessary for the purposes aforesaid, or the owner or owners of any spring or springs, stream or streams of water which may be used and appropriated by the company, or any person who may be injured by the appropriation or division of the waters used by said company, cannot agree with the said company upon the damages or compensation to be paid to the said owner or owners, person or persons, it shall and may

be lawful for the parties to appoint, or if the parties cannot agree, then on application of the person or party complaining for the Court of Common Pleas of Northampton County, to appoint three disinterested and suitable persons to accertain and report to said Court on oath or affirmation what damages if any, have or will be done by said company, which report having been returned and confirmed by the Court, judgment shall thereon be entered, and execution be issued therefor with costs, as in other cases: *Provided*, That either party may appeal from the report, or award to the Court within twenty days after the same shall have been reported in open Court in the same manner that appeals are allowed from the award of arbitrators.

Sect. 11. That any person who shall wilfully destroy or injure in any manner, the ditches, pipes, aqueducts, trunks, cisterns, reservoirs or any other of the works belonging to said company, erected in pursuance of this act, or shall wilfully corrupt or render unwholesome, or unfit for use, the spring or springs, stream or streams of water used by said company, or the water in any ditch, dug or erected by the said company, or shall in any manner pollute or render noxious or offensive the said water, every such person so offending shall forfeit and pay a sum not less than five nor more than one hundred dollars at the discretion of the magistrate,

before whom suit may be brought for the same, and which penalty may be recovered with costs in the name of the said corporation, in the same manner that debts of one hundred dollars and under are recoverable, the one-half for the use of the person who shall give information, and the other half for the use of the company; and if any person against whom judgment shall be rendered as aforesaid, shall neglect or refuse to pay the amount of such judgment, and no goods or chattels of such person can be found whereof, to levy the same by execution, then such person or persons shall be committed to the jail of Northampton County, for any period of not less than one nor more than fifty days, at the discretion of the justice rendering such judgment, and shall, moreover, remain liable for the full amount of damages to the said company, in any other action instituted by them, and shall be subject to indictment for a misdemeanor, in the Court of Quarter Sessions, of said county of Northampton.

Sect. 12. That any person or persons who shall take or use any of the said water for any purpose or use whatever, without having previously contracted for the same, with the said company, shall forfeit and pay for every such offence, the sum of three dollars to the said company, to be recovered before a justice of the peace, in the name of said company, by action of debt.

SECT. 13. That the said company, if necessity require, shall have power at any time to borrow any sum of money, not exceeding ten thousand dollars, to be applied to the prosecution or improvement of the said work or works, and to pledge their goods aud chattels, property, franchises and effects, by mortgage or otherwise, for security and re-payment of the same: *Provided*, That no bonds for a less sum than one hundred dollars shall be issued.

SECT. 14. That the owners of said freehold on and upon which the water of the said company is taken and used, shall in all cases be the parties with whom the contracts, for the use of the water, shall be made, and the said real estate be bound for, and liable for the payment of the same.

SECT. 15. That it may be lawful for the said company to increase the number of shares to eight hundred, in case it shall be found necessary for the due completion and extension of the objects and purposes intended by this act.

E. B. CHASE, *Speaker of the House of Representatives.*

M. M'CASLIN, *Speaker of the Senate.*

APPROVED—The fourth day of May, one thousand eight hundred and fifty-four.

WM. BIGLER.

A SUPPLEMENT ACT TO INCORPORATE THE WEST WARD WATER COMPANY OF EASTON.

SECT. 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same*, That it shall be lawful for the West Ward Water Company to lay pipes, erect hydrants, introduce water and exercise all the powers, privileges and authority granted and conferred upon them by the act of incorporation to which this is a supplement, throughout the whole extent of the borough of Easton, excepting so much of the said Act as is inconsistent with the provisions of this Act: *Provided*, That in the erection and construction of the works of the said company, they shall not lay their pipes or erect their hydrants or other machinery in such way or manner as to interfere with or injure the pipes, hydrants, or other machinery of the Easton Water Company heretofore laid, erected or constructed.

SECT. 2. That it shall be lawful for the West Ward Water Company to purchase and consolidate all the

property, real, personal or mixed, belonging and appertaining to the Easton Water Company, and the same to hold, occupy, use and enjoy together with all the rights, privileges, powers and authority of the said Easton Water Company of whatsoever kind or nature, upon such terms and conditions as may be agreed upon by the said companies, subject, nevertheless, to the liabilities, restrictions, regulations and requirements contained in the act of incorporation of the said Easton Water Company, and the several supplements thereto, and the act of incorporation of the said West Ward Water Company and this Act.

Sect. 3. That it shall be lawful for the said West Ward Water Company to increase the number of their shares and amount of capital stock, and to issue certificates therefor to such number and amount as shall be necessary to carry into effect the provisions of this Act, and to borrow any sum of money not exceeding twenty thousand dollars, and to secure the payment of the same in the same manner as is provided in the thirteenth section of the act to which this is a supplement, and the same notice shall be given, and the same payments made as to the increase of shares and amount of capital as is provided in said act, for the organization and management of the said company.

Sect. 4. That it shall be the duty of the said West

West Ward Water Company, in addition to furnishing a sufficient supply of water for the extinguishment of fires as provided for in the eighth section of the act, to which this is a supplement, to erect and keep in repair at their own expense, fire plugs as designated in said section, and in the event of an ornamental fountain being erected by the borough or citizens thereof, to supply the same with a reasonable quantity of water free of charge: *Provided*, That in such parts of the said borough as the said company shall lay pipes and furnish water along the streets, in which the Easton Water Company have erected fire plugs, the said West Ward Water Company shall alternate with the Easton Water Company, in the erection and keeping in repair of a sufficient number of fire plugs for the said borough.

Sect. 5. That it shall not be lawful for the West Ward Water Company, the said Easton Water Company, or either of them after the first day of January next, to charge any person or persons or corporation for the use of water furnished by them, at a greater rate than the rates hereby established for the cases hereinafter enumerated; and it shall be the right of citizens of the said borough to demand and receive of the said water companies, or either of them, a supply of good water at any rate per annum not exceeding the following, which it shall be lawful for the said companies or

either of them to demand and receive, at such times, and upon such conditions, as they or either of them, shall by their by-laws establish for the furnishing of water generally; for each hydrant or the use of a hydrant, four dollars; for the first extra cock, one dollar, for the second and each subsequent cock, fifty cents; for every private bath, three dollars; for every public bath, five dollars; for every pave wash, three dollars; for the bar of every hotel, and for every place where liquors are sold and drank, twenty dollars; for every office, store and for every shop where water is not used for mechanical purposes, one dollar; and for every other case not above enumerated, such reasonable sum as may be agreed upon by the parties.

Sect. 6. That the qualified electors of the borough of Easton shall at their next annual borough election, and annually thereafter, elect three disinterested citizens of said borough, who shall be called water commissioners, whose duty it shall be to meet at the town hall of the said borough within twenty days after the said companies or either of them shall have laid their annual water tax, and notified each taxable of the amount of his, her or their tax, and hear their complaints of citizens of the said borough as to any injustice in the levying of said tax, and after hearing the parties present, the said water commissioners shall make

such decree in the premises as shall be equal and just, and such decree shall be final between the parties: *Provided*, That before proceeding to the performance of their official duties, they shall take and subscribe the constitutional oath of this Commonwealth, and shall give at least five days' notice of such meeting in at least two of the newspapers published in the said borough: *And provided*, That on failure to elect, or in case of vacation from any cause, the Town Council shall be authorized to appoint until the next annual election.

SECT. 7. That so much of the Act of Incorporation, to which this is a supplement, as renders real estate, or any interest in real estate, greater than a freehold, liable for water rents, is hereby repealed.

SECT. 8. That it shall not be lawful for the said West Ward Water Company after the passage of this act, to make a dividend among the stockholders thereof of any greater sum than ten per cent. of the net proceeds of the said company; and whenever the same shall exceed such sum, the excess thereof shall, under the approval of the Court of Common Pleas of said county of Northampton, be invested in trust for the use of the said borough of Easton from time to time, until the amount of such fund shall equal the actual cost of the said water company, for the erection and construction of their works as aforesaid, when the said company

shall accept the same, and in consideration thereof transfer all the rights and property aforesaid to the corporation of the Borough of Easton; and until such time it shall be the duty of the managers of the said company to make and report to the said Court an annual statement of the business affairs of the said company.

HENRY K. STRONG, *Speaker of the House of Representatives.*

WM. M. HIESTER, *Speaker of the Senate.*

APPROVED—The fifth day of May, Anno Domini one thousand eight hundred and fifty-five.

JAS. POLLOCK.

AN ACT SUPPLEMENTARY TO AN ACT INCORPORATING THE WEST WARD WATER COMPANY, OF THE BOROUGH OF EASTON.

SECT. 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same*, That the West Ward Water Company are hereby authorized and empowered to execute a mortgage or mortgages of all their estate, real, personal and mixed, or of so much thereof as the board of directors shall think fit, and of all their chartered and corporate franchises, rights and privileges, to those persons who, as endorsers, sureties or guarantors for said West Ward Water Company, have paid, or are liable to pay, the bona fide indebtedness of said company; and the board of directors shall have power to ascertain and designate the said mortgages, and the amount for which said mortgage or mortgages shall be given.

SECT. 2. At any judicial sale which shall be had under said mortgage, all the aforesaid estate, franchises, rights and privileges, described and set forth in said mortgage, shall pass to and vest in the purchaser or purchasers at such sale, in the same manner and with

the same effect as the same were held and enjoyed theretofore by the said mortgagors.

SECT. 3. The said purchasers shall proceed to organize their corporation, issue certificates of stock, not exceeding one hundred and twenty thousand dollars, in sums of fifty dollars each, representing their corporate property, and proceed to complete and conduct their works of said corporation, under the name and style of "The Lehigh Water Company."

SECT. 4. Any such sale made as aforesaid, the said corporate estates, rights, privileges and franchises shall be sold clear of all incumbrances; and the purchase money shall be applied to the liens in order of priority, according to law, and under the direction of the court, if required by the parties interested.

SECT. 5. The West Ward Water Company shall continue to exist for the mere purpose of liquidation, and unless a sequestrator shall be appointed by the court, such liquidation shall be conducted by the board of directors.

SECT. 6. That the corporation of the borough of Easton be and they are hereby authorized to increase its indebtedness to an amount not exceeding one hun-

dred and twenty thousand dollars; and for that purpose to issue the bonds of the said corporation, with interest coupons attached, in such sums, and payable with interest at such dates as the Town Council of the said borough of Easton shall order and direct, and to dispose of the said bonds for the best rates and on the best terms can be obtained for the same, for the purpose of supplying the said borough of Easton with water: *Provided*, That said corporation of the borough of Easton shall become the purchaser of the property of the West Ward Water Company, under the sale authorized by this Act, or otherwise.

JOHN M. THOMPSON, *Speaker of the House of Representatives pro tem.*

WM. M. FRANCIS, *Speaker of the Senate.*

APPROVED—The twentieth day of March, Anno Domini one thousand eight hundred and sixty.

WM. F. PACKER.

A FURTHER SUPPLEMENT TO THE BOROUGH OF EASTON, AUTHORIZING THE TOWN COUNCIL OF SAID BOROUGH TO CONSTRUCT AND PROVIDE PUBLIC WATER WORKS, AND TO AUTHORIZE THE ELECTION OF WATER COMMISSIONERS.

SECT. 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That the corporation of the borough of Easton, in the county of Northampton, be and is hereby authorized to construct and provide public water works for said borough and vicinity, and for the protection of the property of the citizens, and to this end hold the real and personal estate necessary, for carrying out the object of this Act.

SECT. 2. That said borough corporation shall have power to buy the works of any existing water companies there, now in operation, with the rights, powers, privileges and franchises to them belonging, in case it shall bedeemed advisable: *Provided, however,* That the amount paid in such purchase shall not exceed the sum paid by said existing water companies, with six percen-

tum thereon, after deducting all dividends and interest received by the stockholders thereof.

SECT. 3. That the qualified voters of said borough, at the next election, shall select three competent freeholders, one from each ward, to compose a board of water commissioners, who shall have full power and authority to carry this Act into effect, and by contract, or otherwise, locate and construct water works with sufficient reservoir, using the water from the river Delaware, and generally with power to make all contracts and purchases necessary therefor; said commissioners, when elected, to hold their office for one, two and three years respectively, which shall be ascertained by lots drawn in presence of, and under the superintendence of the town council of said borough, at a meeting, in the town hall, to be called for that purpose, within thirty days after election; which being done, one water commissioner thereafter shall be elected annually for the term of three years, and in case of death, resignation or removal from office, the board of town council shall appoint, by a majority thereof, to fill vacancies until the next election.

SECT. 4. That the borough corporation is authorized to issue bonds to raise the money necessary for the purpose of this Act, payable with six per centum interest,

semi-annually, to the holders thereof; said bonds to be exempt from taxation for borough purposes, the amount thereof not to exceed one hundred and fifty thousand dollars, and payable in ten, fifteen, twenty and twenty-five years after issue, with the reserved right to pay the same, or any number thereof, after five years.

Sect. 5. That water shall be supplied along the streets and alleys of said borough, where the same is built up, and the borough sufficiently furnished with fire plugs and public hydrants, for the use of the citizens, as soon as conveniently can be done.

Sect. 6. That the real and personal estate of the citizens, within the watered district, shall be liable to taxation for water purposes, to be collected with the borough tax, in such amount as shall be necessary, from year after year, to pay the interest on the unpaid bonds issued, with the principal thereof, as they become due, after first applying the income of the works to this purpose.

Sect. 7. That said commissioners shall fix and establish the water rates chargeable to consumers; which same shall be paid quarterly, after ten days' notice given; and for default of payment, by any consumer, for ten days after due, such water rates shall be collected with costs, by due course of law.

SECT. 8. That the revenue from said water works shall be paid over to the borough treasurer, whose official bond shall be increased by such an amount as shall be sufficient to cover the same, and for the faithful performance of the duties of his office as receiver of water and borough tax.

SECT. 9. That all moneys appropriated to the construction of said water works, shall be drawn by checks on the borough treasurer, signed by said commissioners, or a majority of them, and countersigned by the president of the town council, for the time being.

SECT. 10. That all assessments for water dues, by the commissioners, shall be made on, or before the first day of March, in every year; and that said commissioners, after assessment, within ten days, on public notice given, shall meet at the town hall for three successive days, and longer, if necessary, to hear objections made by the citizens, and to decide thereon; from whose decision any water consumer may take appeal, within five days, to the town council, for final hearing and judgment.

SECT. 11. That the board of water commissioners shall appoint a clerk and water superintendent, and keep accurate books, containing all expenditures made

by them in the construction of the works, showing the amounts drawn from the borough treasurer therefor, also, a record of the annual assessment of water rates, and every other matter pertaining to the duties of their office, of which they shall annually make report, in writing, to the council of the borough corporation, and oftener, if required.

SECT. 12. That it shall be the duty of the town council, and they are hereby required, to enact and enforce such ordinances as may be necessary for the protection of the works, and all pipes, fixtures and appliances connected therewith, and for imposing fines and penalties upon all persons for malicious and wilful waste of water, and generally for all other offences, in any way tending to the injury of the property, rights and franchises acquired under this act.

SECT. 13. That the town council shall exercise a general supervision over the water works, and the affairs and doings of the commissioners, with their superintendent and clerk; shall have power to dismiss from office, in case of malfeasance, by a vote of two-thirds; and from time to time to adopt such rules as may be necessary, for the careful and judicious management of the water department, to the end that the water rates established may be equal and just, and the revenue there-

from such as ultimately to cancel and discharge the liability of the borough corporation, authorized under this act.

JOHN P. GLASS, *Speaker of the House of Representatives.*

LOUIS W. HALL,
Speaker of the Senate.

APPROVED—The twelfth day of March, Anno Domini one thousand eight hundred and sixty-seven.

JNO. W. GEARY.

A SUPPLEMENT TO AN ACT PROVIDING FOR THE PURCHASE, ERECTION AND CONSTRUCTION OF PUBLIC WATER WORKS, FOR THE BOROUGH OF EASTON, NORTHAMPTON COUNTY, BY THE CORPORATE AUTHORITY OF SAID BOROUGH.

Sect. 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That the qualified voters of Easton shall have the right to determine, by vote, the expediency of constructing water works, by said borough corporation, as provided in the act to which this is a supplement; and for this purpose the council are directed and required to call a special election, in the respective wards, to be conducted in the manner provided for spring elections, the expense of which shall be paid by the borough.

SECT. 2. That the borough council shall provide two sets of tickets for the said election, with the general heading, "Borough Water Works," and underneath the same, on one set, "In favor of," on the other set,

"Against," that the voice of the people may be clearly expressed, which same, when ascertained, shall be entered upon the books of the borough corporation.

SEC. 3. That in case the majority of the qualified voters of said borough, as determined by said election, shall be in favor of said act, it shall be the duty of the town council forthwith to proceed and carry out the provisions therein contained; but in case the majority shall pronounce against the same, all proceedings under the act may be suspended, until the citizens may determine hereafter, at some spring election, to carry out its provisions, and construct public water works, under the act authorizing the same, to which this is a supplement.

JOHN P. GLASS, *Speaker of the House of Representatives.*

LOUIS W. HALL, *Speaker of the Senate.*

APPROVED—The fifteenth day of April, Anno Domini one thousand eight hundred and sixty-seven.

JNO. W. GEARY.

PROVISIONS OF THE ACT OF 1874 "TO PROVIDE FOR THE INCORPORATION AND REGULATION OF CERTAIN CORPORATIONS."

CORPORATIONS ACCEPTING. SEC. 26.

Corporations for any of the purposes named, and covered by the provisions of this Act, heretofore created by any special act, or in existence under the provisions of any general law of this commonwealth, upon accepting the provisions of the constitution and of this Act by writing under the seal of said corporation, duly filed in the office of the secretary of the commonwealth, shall be entitled to all the privileges, immunities, franchises and powers conferred by this act upon corporations to be created under the same; and upon such acceptance and approval thereof by the governor, he shall issue letters patent to said corporation reciting the same.

WATER AND GAS COMPANIES. SEC. 34, CLAUSE 3.

The right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one; and no other company shall be incorporated for that

purpose until the said corporation shall have from its earnings realized and divided among its stockholders, during five years, a dividend equal to eight per centum per annum upon its capital stock: *Provided*, That the said corporations shall at all times furnish pure gas and water, and any citizen using the same may make complaint of impurity or deficiency in quantity, or both, to the court of common pleas of the proper county, by bill filed, and after hearing the parties touching the same, the said court shall have power to make such order in the premises as may seem just and equitable, and may dismiss the complaints or compel the corporation to correct the evil complained of.

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JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886. NO. 199.

The Lehigh Water Company,

Plaintiff in Error.

vs.

The Corporation of the Borough of Easton and the Board of Water Commissioners of the Borough of Easton.

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Brief for Defendants in Error.

WILLIAM S. KIRKPATRICK,
ROBERT I. JONES,
Counsel for the Board of Water Commissioners of Easton, Defendant in Error.
FRANK REEDER,
WILLIAM BEIDELMAN,
Counsel for the Borough of Easton, Defendant in Error.

EXPRESS PUB CO. PRINT, EASTON, PA.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886. NO. 199.

THE LEHIGH WATER COMPANY,
Plaintiff in Error

vs.

THE CORPORATION OF THE BOROUGH OF EASTON AND THE BOARD OF WATER COMMISSIONERS OF THE BOROUGH OF EASTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR DEFENDANTS IN ERROR.

WILLIAM S. KIRKPATRICK,
ROBERT I. JONES,
Counsel for the Board of Water Commissioners of Easton, Defendant in Error.

FRANK REEDER,
WILLIAM BEIDELMAN,
Counsel for the Borough of Easton, Defendant in Error.

Opinion of the Court of Common Pleas of Northampton County, Pennsylvania.

This is a bill filed by the above-named plaintiffs against the defendants, to restrain by injunction preliminary until final hearing, and after final hearing perpetually the Corporation of the Borough of Easton and the Town Council of the said borough from constructing or providing public water works, or from appropriating any money for the construction of the said water works, and the said Board of Water Commissioners from locating and constructing water works for the supply of the citizens of Easton with water.

The specific grounds upon which the relief, by injunction, is sought to be sustained, are:

First. That the grant by the Act of the General Assembly, entitled "A further supplement to the Borough of Easton, authorizing the Town Council of the said borough to construct and provide public water works, and to authorize the election of Water Commissioners," passed March 12, 1867, and the Act of the General Assembly, entitled "A supplement to an Act providing for the purchase, erection and construction of public water works for the Borough of Easton, Northampton County, by the corporate authorities of said borough," passed April 15, 1867, has no validity under

Article XVI., Section 1, of the present Constitution, inasmuch as the Borough of Easton did not avail itself of the privileges conferred by said acts before the adoption of said constitution.

Second. That the plaintiffs on the 21st of June, 1880, accepted the provisions of the Act of April 29, 1874, entitled "An Act to provide for the incorporation and regulation of certain corporations," whereby "their right to have and enjoy the franchises and privileges of such corporation within the district or locality covered by its charter is an exclusive one."

Third. That the said Acts of March 12, 1867, and April 15, 1867, are unconstitutional.

1. As to the effect of the first Section of Article XVI., of the present constitution, which declares that "all existing charters or grants of special or exclusive privileges, under which a *bona fide* organization shall not have taken place and business been commenced in good faith at the time of the adoption of this constitution, shall thereafter have no validity." This article is designated "Private Corporations." It is manifest from the language of the first section that it was not intended to apply to municipal corporations. The charters, etc., referred to in the section contemplate an organization by individuals under the existing charters or grants of special or exclusive privileges, and business commenced under said organization. This language is not appropriate to a mere enlargement of powers and privileges conferred upon a municipal corporation already in ex-

istence and performing its *quasi* governmental functions. A power subsequently conferred, or a duty imposed upon a municipal corporation to erect water works, requires no special organization to carry it into effect; nor can it be said, that when such water works are completed and in operation, that the municipal corporation is doing business. A municipal corporation, like a borough, as distinguished from a private corporation, is a body politic and corporate, established by law, to share with civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town or district which is incorporated. The word "charter," in the above section of the constitution, is synonymous with the words "grants of exclusive or special privileges," immediately following it; and the purpose of the constitutional provision under certain conditions, is to make invalid and destroy the entire corporate, power and franchise and not to make invalid and destroy a mere enlargement of privileges granted by subsequent legislation to a corporation already organized.

2. The 26th section of the Act of April 29, 1874, relating to the incorporation and regulation of certain corporations, provides, that "corporations for any of the purposes named, and covered by the provisions of this Act, heretofore created by any special act, or in existence under the provisions of any general law of this Commonwealth, upon accepting the provisions of the Constitution and of this Act, by writing under the seal of said corporation, duly filed in the

office of the Secretary of the Commonwealth, shall be entitled to all the privileges, immunities, franchises and powers conferred by this Act upon corporations to be created under the same," etc.

The 34th section of the same Act relates to gas and water companies, and the 3d clause of said section provides that "the right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one; and no other company shall be incorporated for that purpose until the said corporation shall have, from its earnings, realized and divided among its stockholders, during five years, a dividend equal to eight per centum per annum upon its capital stock."

The plaintiffs having accepted the provisions of the Constitution and of the Act, claim the right to have and enjoy exclusively, except as therein restricted, the franchises conferred on them by their charter of incorporation, on the ground that the legal effect of the Act of 1874 is a repeal of the Acts of March 12 and April 15, 1867. We think not. That the plaintiffs have certain rights that are exclusive for a limited period, there is no doubt. But how and as to what parties? Clearly not against a corporation of like character authorized by law to supply water to the inhabitants of the Borough of Easton, and in existence and operation at the time of the incorporation of the plaintiffs under the Act of 1874. The statute prohibits the incorporation of any other company for the same purpose until the corpora-

tion shall have, from its earnings, realized and divided among its stockholders, during five years, a dividend equal to 8 per centum upon its capital stock. The words of the statute that the right shall be an "exclusive one," standing alone probably would confer such a right even against an existing corporation of like character, not organized and with no water works in operation, and also against a municipal corporation where the latter has not availed itself of the right and privilege to erect and operate such works. But the words immediately following the words "exclusive one," and part of the same sentence, manifestly show the words "exclusive one" have reference to the prohibition in the future, under certain limitations, of the incorporation of another company for a like purpose. It also appears that it was not the intention of the Legislature to interfere with the municipal rights, for the 7th clause of the same section provides "that nothing in this section contained shall authorize a company incorporated under the provisions of this Act *to construct gas or water works* within the limits of any municipality, where gas or water works shall have been constructed by said municipality, without the lawful consent of said corporate authorities thereof." Thus while the statute protects the rights of municipalities against their invasion by incorporated companies, where water works have already been constructed by the former, it nowhere, either by express words or clear implication, excludes the right of municipalities having the legal authority as in this case, to erect water works from exercising the same. It is not pretended that the acts of 1867 are ex-

pressly repealed. The acts that are expressly repealed are those of April 7, 1849; April 24, 1854, July 18, 1834, and March 21, 1873. Moreover the rule of construction is that "all acts of incorporation and acts extending the privileges of incorporated bodies, are to be taken most strongly against the companies. Whatever is not expressly and unequivocally granted in such acts is taken to be withheld." Packer vs. Sunbury and Erie Railroad Company, 7 Harris, 218. In this case Black, C. J., says that "the same rule was laid down by Chief Justice Marshall in Bellinger vs. The Providence Bank, 4 Pet., 514, and in the Charles River Bridge vs. The Warren Bridge, 11 Pet., 420, it was placed on grounds so impregnable by the present Chief Justice of the United States that it is not probable that we will ever hear it seriously questioned again."

As to the unconstitutionality of the act of March 12, 1867, and April 15, 1867. It is contended by the plaintiffs and so set forth in their bill, that in 1867, and prior thereto, they had the legal right of introducing into the borough of Easton and such portions of Forks Township as are adjacent, a supply of pure water for the use of the inhabitants of the same; that this right was originally granted to the "West Ward Water company" and "The Easton Water Company," bodies duly incorporated by law; that by virtue of the powers and privileges granted to said corporations they expended large sums of money in the erection and construction of water works and reservoirs and in laying water mains and pipes through various streets in said borough; that prior

to 1867 "The West Ward Water Company" became the owners by purchase of a portion of the works of "The Easton Water Company;" that prior to 1860 "The West Ward Water Company" became embarrassed and unable to pay their debts. The Legislature, by a supplement to their act of incorporation, passed March 20, 1860, empowered said corporation to mortgage all their estate and their chartered and corporate franchises, rights and privileges to those persons who as endorsers, sureties or guarantors had paid, or were liable to pay, the indebtedness of said company, and that at any judicial sale which might be had under said mortgage, all the estate, franchises, rights and privileges of said company passed to and vested in the purchasers, who were then authorized to organize a corporation under the name and style of the Lehigh Water Company. That a mortgage was afterwards executed by the West Ward Water Company, and subsequently by judicial sale under said mortgage all the estate, franchises, etc., were sold by the sheriff to certain citizens of the borough of Easton for the sum of $40,000, who thereupon organized as a corporation under the name of "The Lehigh Water Company." That the Lehigh Water Company by virtue of the purchase of the corporate franchise of "The West Ward Water Company," are subject to the same duties, obligations and requirements imposed upon "The West Ward Water Company," by their act of incorporation and supplements, viz: from time to time, and at all times, to furnish water for the extinguishment of fires free of charge to said borough, at points and places along improved property, supplied with water by

said company, and to erect and keep in repair at their own expense fire-plugs for furnishing water as aforesaid, and in the event of an ornamental fountain being erected by the borough or citizens thereof to supply the same with a reasonable quanity of water free of charge. That the said West Ward Water Company did from time to time erect a large number of fire-plugs, and they and the said plaintiff did supply the same with water for the extinguishment of fires without charge to the inhabitants of the borough of Easton. That the plaintiffs in addition to the duty of keeping the said fire-plugs in repair are now required by law to erect more fire-plugs in certain portions of the borough, and hereafter additional ones along streets as property is improved and pipes are laid therein for the supply of water. That by Section 8 of a supplement to the act of incorporation of "The West Ward Water Company," it is further provided "that it shall not be lawful for the said 'The West Ward Water Company,' after the passage of this Act, to make a dividend among the stockholders thereof of any greater sum than 10 per cent. of the net proceeds of the said company, and whenever the same shall exceed such sum the excess thereof shall under the approval of the Court of Commen Pleas of said county of Northampton, be invested in trust for the use of the said borough of Easton from time to time, until the amount of such fund shall equal the actual cost of the said West Ward Water Company for the erection and construction of said works, as aforesaid, when the said company shall accept the same, and in consideration thereof transfer all the rights and property

aforesaid to the corporation of the borough of Easton, and until such time it shall be the duty of the managers of said company to make and report to the said Court an annual statement of the business affairs of said company."

Upon this state of facts it is contended by the plaintiffs that the grant by the Legislature of the State of certain privileges, powers, franchises, &c., to "The West Ward Water Company,,' subject to certain duties, obligations and requirements to the borough of Easton and its inhabitants, and which passed to the plaintiffs by judicial sale, constitutes a contract between the State and "The West Ward Water Company," and also "The Lehigh Water Company," and therefore the several Acts o. 1867, empowering the borough of Easton to erect water works within said borough, are in violation of Section 10, Article I., of the Constitution of the United States, which declares that "no State shall pass any law impairing the obligation of contracts." This constitutional provision has frequently raised questions of no ordinary magnitude; and, in a variety of cases, it has been the subject of adjudication by the highest Judicial tribunal of the United States and of the several States, and has been argued by the ablest lawyers in the land.

It is horn book law, that an Act of Assembly is to be presumed constitutional, unless shown to be unconstitutional by the party who alleges that it is so. Courts will not declare an Act of Assembly void, unless it

violates the Constitution, clearly, palpably, plainly, and in such a manner as to preclude doubts or hesitation. [Speer vs. School Directors, 14 Wr., 150] The question of the unconstitutionality of the Act of 1867 might safely be determined by this rule. An examination, however, of one of the ablest text-books on Constitutional law and a few leading cases decided by the Supreme Court of the United States, etc., leaves no doubt as to the constitutionality of these laws. Cooley on Con. Lim., p. 384, states the law thus: "The granting of a new charter to a new corporation may sometimes render valueless the franchises of an existing corporation; but unless the State, by contract, has precluded itself from such new grant, the incidental injury can constitute no obstacle." In support of this proposition he cites *Charles River Bridge vs. Warren Bridge*, 11 *Pet.* 420. *Turnpike Company vs. State of Maryland*, 3 *Wall*, 210. *Piscataqua Bridge vs. New Hampshire Bridge*. 7 *N. H.* 35.

In a note the author briefly states the case of Charles River Bridge vs. Warren Bridge as follows: "The State of Massachusetts granted to a corporation the right to construct a toll bridge across the Charles River under a charter which was to continue for forty years, afterwards extended to seventy, at the end of which period the bridge was to become the property of the Commonwealth. During the term the corporation was to pay £200 annually to Harvard College. Forty-two years after the bridge was opened to passengers, the State incorporated a company for the purpose of erect-

ing another bridge over the same river, a short distance only from the first, and which accommodated the same passengers. The necessary effect would be to decrease greatly the first franchise, if not to render it altogether worthless. But the first charter was not exclusive in its terms; no contract was violated in granting the second; the resulting injury was incidental to the exercise of an undoubted right by the State, and as all the vested rights of the first corporation still remained, though reduced in value by the new grant, the case was one of damage without legal injury.

In Turnpike Company vs. State of Maryland, *supra*, it was held that if a State grants no exclusive privilege to one company which it has incorporated, it impairs no contract by incorporting a second one which largely profits to the injury of the first.

"So a grant to a corporation to erect a toll bridge without any restriction of the power of the Legislature to grant a similar privilege to others would not deprive a future Legislature of the power to authorize the erection of another bridge, although it would divert a portion of the travel from the bridge which had been formerly erected." Mohawk Bridge Company's U. and S. R. Co., 6 Page, 554.

A clause in a statute, "that it shall not be lawful for any person or persons to erect a bridge within a distance of two miles," means, not only that no person or association of persons shall erect such a bridge without

legislative authority, but that the Legislature itself will not make it lawful for any person or association of persons to do so by giving them authority. (The Binghampton Bridge, 3 Wall, 51. To the same effect, Piscataqua Bridge vs. New Hampshire Bridge, 7 N. H., 35). While in these cases a subsequent grant to other persons to erect a bridge within said limits is declared to be unconstitutional solely on the ground of the prohibition in the former grant, yet even to this extent the decision in the former case was by a divided Court, Chase, C. J., and Grier and Field, J. J., dissenting. That it is the settled law of the land, cannot be questioned, "that a private corporation created by an Act of the Legislature, which, in connection with its acceptance, is regarded as a compact, and one which, so long as the body corporate faithfully observes, the Legislature is constitutionally restrained from impairing by annexing new terms and conditions, onerous in their operation, or inconsistent with a reasonable construction of the compact. (Angell & Ames, on Corporations, p. 22). The case of Dartmouth College vs. Woodward, (4 Wheat., 636) and subsequent cases which sanction and affirm the law of that case, are principally relied upon by the plaintiffs that the acts of 1867 are unconstitutional. As I understand the law and facts of that case, it has little, if any, application to the question now under consideration. The Supreme Court of the United States there held "that the charter incorporated twelve persons therein mentioned as trustees, and granted to them and their successors the usual corporate privileges and powers, and declared that the trustees should for-

ever thereafter consist of twelve, and no more, and should govern the college and fill up all vacancies which might be created in the body, is a contract, within the meaning of the clause in the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts; and that the subsequent statutes of New Hampshire which increased the number of trustees to twenty-one and gave the appointment of the additional members to the Executive of the State, and created a board of overseers with power to inspect and control important acts of the trustees, being passed without the previous or subsequent assent of the trustees, were unconstitutional and void. A mere statement of the case shows a radical alteration of the charter in many and material respects, by which the powers and privileges of the corporation and trustees were practically taken away, the number of trustees increased, and the appointing power vested in the Executive of the State, and the control of the corporate property and franchises conferred upon a board of overseers created for that purpose. Here then was a direct invasion of the rights of property of an incorporation, and substantially a destruction of its corporate privileges and powers. Whatever doubts may since have been entertained by Courts as to the soundness of the law in that case, it need not be questioned here so far as it affects the question of the unconstitutionality of the law now under consideration. That question must be ruled by the cases heretofore cited, and for the reason therein expressed we hold that the Acts of 1867 are clearly and undoubtedly constitutional.

And now, October 2, 1882, preliminary injunction refused and the bill of plaintiffs dismissed at their costs.

O. H. MEYERS, P. J.

OPINION OF THE

SUPREME COURT

OF PENNSYLVANIA.

Opinion of the Supreme Court of Pennsylvania. Reported in 102 Penna. State Reports, (6th Outerbridge) 515.

April 9, 1883. Mr. Justice Paxson Delivered the Opinion of the Court.

This was an appeal from the refusal of the Court below to grant a special injunction. With a view to obtain a decision of the Court upon the whole case, an agreement was filed at bar giving to the decision below the effect of a final decree. We will, therefore, treat it as a final decree entered upon a general demurrer to the bill. This admits all the facts sufficiently averred by the plaintiffs, which places them in as favorable a position as they could desire.

The plaintiffs seek to restrain the borough of Easton (defendants) from erecting water works for the purpose of supplying said borough with water. The facts necessary to a proper understanding of the case, briefly stated, are as follows:

On the 12th of March, 1867, an Act of Assembly was passed authorizing the borough of Easton to con-

struct, water works, and to buy the works of any existing water companies, the works to be erected by three water commissioners, to be elected by the qualified voters of the borough: P. L., 412. A supplement to this Act was passed on April 15, 1867, providing that the water works should not be built by the borough until after the question of the erection of said works has been submitted to a popular vote at a spring election, when, if a majority of the qualified voters were in favor of such election the Town Council should proceed to construct the works. A vote was taken at the Spring election in 1881, resulting in a majority in favor of the works. Three persons were elected Water Commissioners at the same time, who purchased a lot upon which to erect said works, and presented a petition to the Court of Common Pleas of Northampton County for the purpose of compelling the Town Council of the Borough of Easton to supply the necessary funds.

The Lehigh Water Company (plaintiff) is a corporation duly authorized by its charter to supply the Borough of Easton with water, and has expended a large amount of money in the construction of its works. It is required by its charter to erect a sufficient number of fire-plugs, and supply water to the borough for the extinguishment of fires without charge. This obligation has been performed, at least in part, and it has furnished the citizens of the borough with water. On the 21st of June, 1880, the said company accepted the provisions of the Act of 29th of April, 1874, P. L., 93, Section 34 of which provides for the incorporation of

water companies, and enacts that, "the right to have and enjoy the franchises and privileges of such incorporations within the district or locality covered by its charter shall be an exclusive one," &c.

The grounds upon which the water company seeks to restrain the borough are: 1. That under the Act of 1874 the right of the water company is exclusive; 2. That the borough has no power under the Act of 1867 to construct water works; and, 3. That to do so would contravene Article I, Section 10, of the Constitution of the United States, which declares that "no State shall pass any law impairing the obligation of contracts."

Neither of these positions can be sustained. While the language from the Act of 1874, above quoted would seem to favor the exclusive right claimed by the water company, a careful examination of Clause 3 of Section 34 shows that the Legislature intended that the right should be exclusive only as against other water companies for immediately in this connection occur the words: "And no other company shall be incorporated for that purpose until the said corporation shall have from its earnings realized and divided among its stockholders, during five years, a dividend equal to eight per centum per annum upon its capital stock." The provision that another company shall not be incorporated was not intended to prohibit a city or borough from providing its citizens with pure water by means of works constructed by itself from money in its own treasury. Aside from this, the water company claims this exclusive right by

reason of the Act of 1874, while the right of the borough to construct the works was conferred by the prior Act of 1867, and there is no pretence that the one Act repeals the other.

It was urged on behalf of the water company, however, that the borough cannot invoke the aid of the Act of 1867, for the reason that not having availed itself thereof prior to the adoption of the Constitution, the right to do so now is taken away by Section 1, of Article XVI. of that instrument, which provides that: "All existing charters or grants of special or exclusive privileges, under which a *bona fide* organization shall not have taken place, and business been commenced in good faith, at the time of the adoption of this Constitution, shall thereafter have no validity." The 16th Article of the Constitution has reference to "private corporations," and it is to such corporations alone that the first section applies. It was intended to extinguish a vast number of charters obtained for speculative purposes, under which "a *bona fide* organization" had not taken place nor "business been commenced in good faith," but which were being hawked about to the manifest shame of the Commonwealth. No one ever supposed that this article was intended to repeal an Act of Assembly conferring additional powers upon a municipal corporation, for the mere reason that the power had not been exercised in whole or in part.

It was urged, however, with considerable ingenuity, that in erecting water works and supplying its citizens

with water the borough was not acting in its capacity as a municipal corporation, but rather in that of a private or business corporation, and Western Saving Fund Society vs. The City, 7 Casey, 175; and Wheeler vs. The City, 27 P. F. S., 338, were cited in support of this proposition. Those cases decide that when a municipal corporation undertakes to supply its citizens with gas and water it must be held to its contracts precisely as a private corporation. But that it is nevertheless a municipal corporation plainly appears from Wheeler vs. The City, where it was attempted to restrain the city from borrowing money for the use of the gas works, upon the ground that such borrowing was prohibited by Article IX, Section 7, of the Constitution, which declares that the "General Assembly shall not authorize any county, city, borough, township, or incorporated district, to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or loan its credit to any corporation, association, institution or individual." The gas cases established the principle that a municipal corporation may perform the functions of a private corporation in supplying its citizens with gas and water. But that by doing so it loses its distinctive municipal character is a proposition that does not require discussion.

The third ground of objection is wholly without merit. By constructing water-works of its own the borough will not destroy the franchises of the plaintiff company. It may impair their value, and probably will do so, but of this the company have no legal cause of

complaint. The granting of a new charter to a new corporation may sometimes render valueless the franchises of an existing corporation; but unless the State by contract has precluded itself from such new grant the incidental injury can constitute no obstacle: Charles River Bridge vs. Warren Bridge, 11 Peters, 420; Turnpike Co. vs. The State of Maryland, 3 Wallace, 210; Piscataque Bridge vs. New Hampshire Bridge, 7 N. H., 35. No contract has been shown between the water company and the State by which the latter is precluded from granting to the Borough of Easton the privilege of erecting works to supply its citizens with water.

We need not pursue the subject further in view of the elaborate and careful opinion of the learned judge below.

The decree is affirmed, and the bill dismissed at the cost of the appellants.

ARGUMENT.

ARGUMENT.

Easton was erected into a borough by special Act of Assembly, September 23, 1789. The power was given "to have, get, receive and possess lands, tenements, "rents, liberties, jurisdictions, franchises and heredi- "taments to them and their successors in fee simple or "for term of life, lives, years or otherwise, and also "goods and chattels and other things of what nature or "kind soever, and also to give, grant, let, sell and assign "the same lands, tenements and hereditaments, goods "and chattels, and to do and execute all other things "about the same by the name aforesaid.

* * * * * * * *

"Section 11. That where any doubts shall arise touch- "ing this Act, the same shall in all Courts of Law and "Equity be construed and taken most favorably for the "said corporation."

The corporate title was The Burgesses and Inhabitants of the Borough of Easton, in the County of Northampton, which was changed to The Borough of Easton, by supplement of March 19, 1828.

We refer to the sections printed in the Appendix of this book.

The right of Easton to construct water works for the supply of pure water to the inhabitants does not rest upon the supplements to the borough charter of March 12 and April 15, 1867.

This power and duty is implied by virtue of its corporate existence, and embraced in the original charter.

While on the one hand the three water companies, Easton, West Ward and Lehigh, were all of them created long after; on the other hand there is nothing in their acts of incorporation forbidding the State of Pennsylvania to incorporate additional water companies in Easton.

Nothing arises by implication respecting corporate powers, and the exclusive rights claimed by private corporations must be granted in express terms.

In reality the said Acts of March 12 and April 15, 1867, are restricting, not enabling acts, for the Borough Water Commissioners are thereby authorized to build, "using the water of the River Delaware," after a vote of the qualified electors. Easton is located on the Delaware and Lehigh Rivers and Bushkill Creek, and until the year 1881, or later, the Lehigh Water Company supplied only water from the river Lehigh.

The question is not whether the proposed Borough Water Works will compete with the Lehigh Water Company, but simply whether the obligations of the

said Lehigh Water Company have been increased or the charter directly legislated upon.

The United States Supreme Court will not interfere with the decisions of the State Courts on any other ground.

Cooley Constitutional Limitations, star paging 13. "But the same reasons which require that the final decision of all questions of national jurisdiction should be left to the National Courts, will also hold the National Courts bound to respect the decisions of the State Courts upon all questions arising under the State Constitutions and laws, where no question of national authority is involved, and to accept these decisions as correct and to follow them whenever the same questions arise in the National Courts."

In Leffingwell vs. Warren, 2 Black 599, this Court in line with former decisions, decides that if the highest tribunal of a State adopt new views on a question of State statutory law reversing its former decisions, the Supreme Court of the United States will follow the latest settled adjudications.

The Supreme Court of Pennsylvania, having in this case decided upon the proper construction of the statute law of the State, and the Constitution of 1874, as far as the same have been invoked by the Lehigh Water Company, their decision is binding, upon the following, to wit:

1. That under the corporation Act of April 29, 1874, the right to construct water works is exclusive only against other water companies, and that it was not the intention of the Legislature to prohibit a city or borough from providing its citizens with pure water, by means of works constructed by itself.

2. That the Acts 12th of March, and 15th April 1869, were not repealed by the Act of April 29, 1874.

3. That the right of Easton to build water works under said last Acts was not invalidated by Article XVI. Section I, of the Constitution of 1874, which relates to private corproations only.

4. That a municipal corporation does not lose its distinctive municipal character, though exercising the functions of a private corporation in supplying its citizens with water.

While we contend that our Court was clearly right in holding as above, the decision below will not be reversed on these rulings, even if your Honors are led to a contrary opinion.

The inquiry is therefore limited to the charters of the different water companies, The Easton Water Company, The West Ward Company and The Lehigh Water Company. (See Acts in full in Appendix of Plaintiff's Brief.")

The charters are not exclusive.

In the case of Stone vs. Mississippi, 11 Otto, p. 818, it is said, "In this connection, however, it is to be kept in mind, that it is not the charter which is protected but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the constitution can act, consequently the first inquiry in this class of cases is whether a contract has in fact been entered into, and if it is so, what its obligations are."

Dartmouth College vs. Woodward was an entirely different case; the legislation there was directly upon the college charter.

Nor are the New Orleans Gas and Water cases and other similar decisions, cited in the Argument of the plaintiff, applicable here, for all are instances of exclusive grants. All that is pertinent in the gas and water cases to the present inquiry is in our favor, for therein it is held to be clearly the duty of a city or other municipality to supply its citizens with light and pure water. It is true that in these cases the Court holds that the power may be granted away by the Legislature.

The argument was that the duty of supplying pure water and light is so intimately connected with the police power, that it cannot be taken away from municipalities, by the Legislative will, and this Court only affirmed that when such powers are granted exclusively, the contract thus created will be enforced.

The right to introduce pure water is considered inherent in all municipal corporations. This is so in Pennsylvania.

Judge Paxson says, in Wheeler vs Philadelphia, in 27 Smith, on p. 354: "While it is no part of the ordinary and necessary duties of a municipal corporation to supply its citizens with gas and water, it is nevertheless true that it may lawfully do so. Without desiring to enter into a nice discussion of the source of its right or power to do this, the fact that it has been exercised in this and many other States for a long time unchallenged exists. Rights have grown up, large expenditures and costly improvements made; the health and comfort of large communities promoted thereby. The lighting of a city with gas and supplying it with pure water are entirely disconnected with wild speculations of the character indicated in the argument."

There are no unusual conditions in the charter of the Lehigh Water Company; nor are any extraordinary burdens imposed. We refer to the Acts of Assembly set out at length in the appendix to the plaintiffs book.

In fact the privilege given to Easton of buying the works is to be found in nearly every charter.

Nor would it avail if the charter was burdensome and extraordinary, to raise by implication the grant of an exclusive right to supply water.

As to the Private Corporation Act of 1874.

Article III. Section 3, Constitution of Pennsylvania, 1874, provides: "No bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title."

This was first inserted under the amendment of 1864, and since then the title of an Act is regarded as part of it, and important upon the question of construction. See as to this point Pennsylvania Rail Road Company vs. Riblet, 16 Smith, on page 169. Eby's Appeal, 20 Smith, 314.

Without repetition of the opinions in the Court of Common Pleas and Supreme Court below, from which it is manifest that the Act of 29th of April, 1874, does not confer exclusive privileges against a municipality, we add the following:

The title is, "An Act to provide for the incorporation and regulation of certain corporations." See Pamphlet Laws of Pennsylvania, page 73, and Statement of Facts, Book of Plaintiff in Error, page 8.

It relates only to Private, not Municipal Corporations. In Section II. the purposes for which the said corporations may be formed are stated giving the divisions of Two Classes, the first not for profit, and the second for profit enumerating each class. This is the general law of Pennsylvania relating to private corporations enacted to give effect to the Constitution of 1874, which provides, Article III. Section 7, against special

legislation in future, "creating corporations, or amending, renewing or extending the charters thereof," Purdon's Digest, 1883, page 29, and page 49, Section 31, of the Schedule directing the Legislature to pass the necessary laws to carry the same into effect.

The Lehigh Water Company, on the 21st of June, 1880, accepted the provisions of the said private Corporation Act. Statement of Facts, page 8.

On the 23rd of May, 1874, prior to such acceptance by said company, the following general law was enacted, Pamphlet Laws 1874, page 230, entitled: "An Act dividing the cities of this State into three classes, regulating the passage of ordinances, providing for contracts for supplies and work for said cities, authorizing the increase of indebtedness, and the creation of a sinking fund to redeem the same, defining and punishing certain offences in all of said cities, and providing for the incorporation and government of cities of the third class."

And on the 11th of April, 1876, Pamphlet Laws 20, a supplement increasing the classes of cities, and making five classes; cities of the fifth to include those having less than twelve thousand inhabitants. Brightly's Purdon's Digest, 1883. Title Municipal Corporations, page 1213. "Section 2. The corporate power and the number, character, powers and duties of the officers of cities of the first, second, third, fourth and fifth class, now in existence, by virtue of the laws of this Commonwealth, shall be and remain as now provided by law except as otherwise provided in this Act."

In the same Act, on page 1219, said cities have power, Section 39, IX.: "To have at all times the exclusive right to supply with water the city, and such persons, partnerships and corporations therein as may desire the same, at such prices as may be agreed upon, and for that purpose to have at all times the unrestricted right to make, erect and maintain all proper water works, machinery, buildings, cisterns, reservoirs, pipes and conduits for the raising, reception, conveyance and distribution of water; or to make contracts with and authorize any persons, company or association to erect all proper water works, machinery, buildings, cisterns, reservoirs, pipes and conduits for the raising, reception, conveyance and distribution of water and give such person, company or association the exclusive privilege of furnishing water as aforesaid for any length of time not exceeding ten years."

On page 1237, the Act provides for Water and Gas Department, XVII, Section 160.

The private corporation Act accepted by The Lehigh Water Company and the municipal corporation Act, both general and in force at the time of said acceptance, must be construed together and their effect is to give municipalities the exclusive right to supply water.

Not only this but while by the Act of April 29, 1874, the State contracts not to incorporate another company for the same purpose until its earnings during five years realized and divided among its stockholders equal eight per cent. per annum upon its capital stock,

the municipality by the Act of May 23, 1874, has power "to make contracts with and authorize any person, company or association to erect all proper water works, machinery, buildings, cisterns, reservoirs, pipes and conduits for the raising, reception, conveyance and distribution of water and give such person, company or association the exclusive privilege of furnishing water as aforesaid for any length of time, not exceeding ten years."

Thus the municipality has always for itself the unrestricted, exclusive right, and its grantees for the term of ten years and the only restriction is upon the Commonwealth.

Of course, where private works exist, the city and the said private corporation must enjoy in common; but in no case shall the private corporation be permitted to exclude the municipality.

It is no answer to say that these powers are confined to cities. On page 1216, Section 23, cities of the third, fourth and fifth class shall be incorporated after a vote of the electors in any town or contiguous towns or boroughs having a population of at least ten thousand.

And at the February municipal election of this present year, Easton availed itself of this provision and is now a city of the fifth class, its corporate title being City of Easton.

The right to introduce water had been given to

Easton by the original charter, as we have seen, and the General Borough Act of 1851, which gives power to all boroughs to provide a supply of water for the use of the inhabitants and to make all needful regulations for the protection of the lamps, pipes, reservoirs and other constructions or apparatus. Brightly's Purdon, page 204.

But without enactment the power to provide for a supply of pure water exists.

Dillon on Municipal Corporations, Sections 9–10, as to the scope of the powers of municipal corporations, and Section 94. The prevention of damage by fire is usually an object within the scope of municipal authority, either by express grant, or by the power in a chartered town or city to make police regulations or needful by-laws.

Again Dillon, Section 13. Towns may provide for the support of a public clock, hay scales, burying ground, reservoirs, and many other like objects which relate to the accommodation and convenience of the inhabitants.

And Ibid, Section 371 ; note citing Rome vs. Cabot, 28, Georgia 50; Weller vs. Atlanta, 43, Georgia 67. Under general authority to make all contracts necessary for its welfare, a city may contract for water works.

It is, however, contended that the Acts of March 12 and April 15, 1867, have been repealed.

By Article XVI., Section 1, of the Constitution.

By the Act 29th of April, 1874.

And first, as to the Constitutional prohibition. The article is entitled Private Corporations.

The language cannot apply to the mere enlargement of the powers of a municipal corporation, nor aim at the destruction of privileges where the corporation has already been organized. The object was to destroy the numerous private charters under which there was no organization or business in good faith. The burden of the debate was the mischief of barter and sale of charters by irresponsible parties. See Debates Constitutional Convention of Pennsylvania, Vol. IV, p. 579, &c.

The third Section of the Act of April 15, 1867, provides that in case a majority of the qualified voters shall pronounce against Borough Water Works, the citizens shall have the right to determine the question at some future election. The elections of 1868 and 1880 decided against borough works. In 1881 the vote was 1,615 in favor, 341 against, showing the large majority in favor of Borough Works of 1,274.

In any view of this provision of the Constitution, the voters availed themselves of the Act within two years, because the first election was in 1868.

It is not correct, as stated on page 41, of the Plain-

tiff's argument, that the Article is entitled Private Corporations, by mistake.

It was first reported by Mr. Woodward as the Report of the Committee on Private Corporations, Fourth Volume of Debates, page 191, with title Corporations, but by Mr. Knight of the revision committee; *Article number sixteen on Private Corporations,* Vol. 7, Debates, 539, on page 751 read third time as, "Article XVI, Private Corporations," and passed under this title on page 782.

On page 539 it is recorded as follows:

"Reports of Revision Committee."

"Mr. Knight. I am instructed by the Committee on "Revision and Adjustment to report article number "twelve, on officers and incompatibility of office; article "number thirteen, on new counties; article number "fourteen, on county, township and borough officers; "article number fifteen, on cities and city charters, and "article number sixteen, on private corporations."

On page 751 we find:

"The President. It is moved to proceed to the con- "sideration of the report of the Committee on Revision "and Adjustment on article number sixteen, on private "corporations." * * * *

"The article was read the third time as follows:"

"ARTICLE XVI."

"PRIVATE CORPORATIONS."

"Section I. All existing charters or grants of special "or exclusive privileges under which a *bona fide* organi- "tion shall not have taken place and business been "commenced in good faith at the time of the adoption "of this Constitution shall thereafter have no validity."

In said Article XVI, nothing is included but private corporations, unless expressly mentioned, as in the 8th Section, for example, wherein mention is made of *Municipal and other Corporations.*

Bailey vs. New York, and Western Savings Fund Society vs. Philadelphia, are sufficiently answered in the opinion below and in Wheeler vs. Phila., in 27th Smith, supra.

The Pennsylvania Constitution does not repeal special legislation unless the intention to repeal is expressly declared. See cases in Pennsylvania, as follows:

City of Pittsburg vs. Kitty Roup, 1 Weekly Notes, 254.

Lehigh Iron Company vs. Lower Macungie, 31 Smith, 482.

Indiana County vs. Agricultural Society, 4 Norris, 357.

County of Allegheny vs. Gibson, 9 Norris, 397.

The principle settled in these cases is, that although special future legislation is prohibited by the Constitution of Pennsylvania, it does not affect existing, special and local laws. Whenever a repeal is intended it is so declared in the Constitution.

The Chincleclamouche Lumber and Boom Company vs. Commonwealth ef Pennsylvania, 100 Pennsylvania State Reports, 438, was the case of a private corporation. The case came up on *Quo Warranto ex rel* Attorney General, and in conformity with the rule in Pennsylvania that the question of forfeiture can only be raised by the Commonwealth.

The Commonwealth only can take advantage of this question, it cannot be raised collaterally.

Lehigh Bridge Company vs. Lehigh Coal and Navigation Company, 4 Rawle ; on page 24 of opinion. A forfeiture of the charter of a private corporation for abuse or neglect of its franchise must be declared by process and judgment of law before the corporation can be treated as defunct.

Irvine vs. Bank, 2 Watts & Sergeant, on page 204. Judge Rogers says: "These prohibitions and restrictions are very positive and expressed in strong language, and if the bank has omitted or neglected to comply with them, and the proper steps had been taken, the charter would have been declared by the proper authority null and void. But the difficulty which meets the de-

fendants is that we cannot judicially know, nor can we now investigate the truth of these allegations; for if there be anything settled beyond all cavil and controversy, it is. that the violation of a charter of incorporation cannot be made the subject of judicial investigation in a collateral suit. The only evidence competent to prove the forfeiture of a charter is the judgment of a Court directly on the point; and no inferior evidence can be admitted for that purpose, unless it is otherwise directed by the Legislature in express and positive terms."

To the same effect are: Freeland vs. Pennsylvania Central Insurance Company decided in 1880; 94 Pennsylvania State Reports, 513; and on page 429, of same volume in case of Spahr vs. Farmers Bank, the same question was raised as here under Article XVI. Section 1, of the Constitution, and it was held that this could not be invoked collaterally. Justice Mercur delivering the opinion of the Court says on page 434: "When there is a *de facto* corporation, and the State does not interfere, its corporate existence, and its ability to contract, cannot be questioned in a suit brought upon an evidence of a debt given to it. Commissioners vs. Bellis, 4 Otto, 104."

To the same point Hanover Junction &c. Railroad Company vs. Haldeman, 82 Pennsylvania State Reports, 36. Opinion of Court, page 45.

The Act of 1874 *does not repeal the Supplements to the charter of the Borough of Easton of March* 12, *and April* 15, 1867.

The said Act contains a repealing clause, to wit: the forty-sixth, which enumerates certain specified Acts of Assembly. These are general Acts for the incorporation of certain kinds of private and pecuniary corporations. It is evident that the general purpose and policy of the Act of 1874 is to codify and combine in one act a general system of incorporation of private corporations. It cannot anywhere be gathered from the terms, or general purpose of the Act set forth in its several sections, that it was intended in any way to affect any special or particular legislation already passed. It will not be pretended that even corporations which have been erected under any of the acts specially mentioned in the repealing clause are in any respect limited or affected by the said Act or its repealing clause.

Moreover, the fact that the Act of 1874 takes special care to enumerate only certain Acts as repealed, naming them and no others, and these only "so far as they pro-" vide for the creation of corporations for any of the " purposes provided for in this Act, or are inconsistent " with this Act," indicates the caution of the Legislature in avoiding the implication of the repeal of anything else.

It is also plain that the Act of 1874 was not intended to legislate in any other way than to provide for the *future* creation of certain kinds of private corporations. It was intended to establish a general and harmonious system for their incorporation and regulation as occasion for them should arise.

The title itself shows that the legislative mind only had in view the regulation of this particular matter, and the title of an Act under our Constitution is a necessary element in the construction thereof. Had it been intended, either directly or by any kind of implication, to legislate away the powers and functions of another class of corporations which are political and public in their charter, some indication of the Legislature's intent ought to be manifest.

It is to be presumed that the sovereign power intended to pass this legislation in harmony with its own political constitution, and if this legislation must be subordinated to the existing condition of things so far as private corporations already created are concerned, much more must it be construed to be in harmony with the constitutions of municipalities already created and existing with certain defined powers and duties for the *public* benefit and covenience.

In Sifrid vs. Commonwealth, 101 Pennsylvania State Reports, 200, the Court say: "It is against reason to suppose that the Legislature in passing a general system for the State intended to repeal a special Act which the circumstances of one county had made necessary."

In City of Harrisburg vs. Sheck, 104 Pennsylvania State Reports, on page 57: "How then can it operate as a repeal by implication. Such repeals are not favored and are not allowed except in cases of strong repugnancy or irreconcilable inconsistency. Brown vs. Commissioners, 22 Pennsylvania State Reports (9

Harris) 39; Erie vs. Bootz, 72 Ibid, 196, (22 P. F. Smith); Wright vs. Vickers, 81 Ibid, (31 P. F. Smith), 122; In re Barbers Election, 86 Ibid, (5 Norris) 392. In Wright vs. Vickers, Woodward, J., said: "To repeal a statute by implication there must be such a positive repugnancy between the provisions of the new law and the old that they cannot stand together or be consistently reconciled. And in Brown vs. Commissioners we held, that a general statute without negative words will not repeal a previous statute which is particular though the provisions in the two be different. In the present case we perceive no conflict between the *Acts* in question which renders them inconsistent or irreconcilable. Their provisions are different but they provide for subjects which are not the same. For this reason they may both stand and be executed together.."

The supplements of March 12, and April 15, 1867, are purely local in their character, while the Act of 1874 relates only to the mode by which Private Corporations may be in future incorporated, and contains a repealing clause which is confined to laws relating to Private Corporations.

Moreover they confer the right upon the electors of Easton to decide upon the expediency of erecting municipal water works, and this cannot be taken away by implication.

This case was fully examined below, and we believe that no other result could have been reached consis-

tently with the authorities. We ask that the judgment of the Supreme Court of Pennsylvania shall be affirmed.

WILLIAM S. KIRKPATRICK,
ROBERT I. JONES,
Counsel for the Board of Water Commissioners of Easton, Defendant in Error.

FRANK REEDER,
WILLIAM BEIDELMAN,
Counsel for the Borough of Easton, Defendants in Error.

APPENDIX.

APPENDIX.

An Act for erecting the Town of Easton, in the County of Northampton, into a Borough, and for purposes therein mentioned. September 7, 1789.

SECTION 4. *And be it further enacted by the authority aforesaid*, that the said Burgesses, freeholders, and inhabitants within the Borough aforesaid, and their successors forever thereafter shall be one body, corporate and politic in deed and name, and by the name of "The Burgesses and inhabitants of the Borough of Easton, in the County of Northampton," one body corporate and politic in deed and in name, are hereby fully created, constituted and confirmed; and by the same name of "The Burgesses and inhabitants of the Borough of Easton, in the County of Northampton," shall have a perpetual succession; and they and their successors by the name of "The Burgesses and inhabitants of the Borough of Easton, in the County of Northampton," shall at all times hereafter be persons, able and capable in law, to have, get, receive and possess lands, tenements, rents, liberties, jurisdictions, franchises and hereditaments to them and their successors in fee simple, or for term of life, lives, years or otherwise; and also goods and chattels and other things of what nature or kind soever; and also to give, grant, let, sell, and assign the same lands, tenements, hereditaments, goods and chattels, and to do and execute all other things

about the same, by the name aforesaid; and they shall forever hereafter be persons, able and capable in law, to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, in all or any of the Courts within this Commonwealth, or other places, and before any judges, justice, or other persons, within the Commonwealth, in all manner of actions, writs, complaints, causes, and matters whatsoever, and that it shall and may be lawful to and for the said Burgesses and inhabitants of Easton aforesaid and their successors, forever hereafter to have and use one common seal for the sealing of all business whatsoever touching the said corporation, and the same from time to time to change and alter.

* * * * * *

Section 10. *And be it further enacted by the authority aforesaid*, that it shall and may be lawful for the Burgesses, freeholders and inhabitants, housekeepers aforesaid, of the said borough, to assemble in town meeting, as often as occasion may require, at which meetings they may make such ordinances and rules not repugnant to or inconsistent, with the laws of this Commonwealth, as to the greatest part of the inhabitants, assembled as aforesaid, shall seem necessary and convenient for the good government of the said borough, and the same to revoke, alter and make anew, as occasion shall require, etc. * * . *

Section 11. That when any doubts shall arise touchtng this Act, the same shall, in all Courts of Law and

Equity, be construed and taken most favorably for the said corporation.

March 18, 1828.—An Act to alter an Act, entitled: An Act for erecting the Town of Easton, in the County of Northampton, into a borough, and for other purposes therein mentioned.

SECTION I. Be it enacted, etc., that the said Town of Easton shall continue a Borough under the name and title of "The Borough of Easton," etc.

* * * * * * *

SECTION 7. *And be it further enacted by the authority aforesaid,* that it shall be the duty of the Town Council, five of whom shall be a quorum, to hold meetings from time to time, as occasion may require, at which meetings they may revise, repeal, or amend all such by-laws or ordinances as have been heretofore made in the said borough, which are hereby declared to be in full force, until so revised, repealed, or amended, and enact such by-laws and ordinances, and make such other rules and regulations as shall be determined on by a majority of them necessary to promote the peace, good order, benefit and advantage of the said borough, etc.

Act of April 3, 1851, General Borough Law of Pennsylvania.

Pamphlet Laws of Pennsylvania, 320.

Purdon's Digest, 1883, 1st Volume, page 204, as to corporate powers under this Act.

about the same, by the name aforesaid; and they shall forever hereafter be persons, able and capable in law, to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, in all or any of the Courts within this Commonwealth, or other places, and before any judges, justice, or other persons, within the Commonwealth, in all manner of actions, writs, complaints, causes, and matters whatsoever, and that it shall and may be lawful to and for the said Burgesses and inhabitants of Easton aforesaid and their successors, forever hereafter to have and use one common seal for the sealing of all business whatsoever touching the said corporation, and the same from time to time to change and alter.

* * * * * *

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Act of April 3, 1851, General Borough Law of Pennsylvania.

Pamphlet Laws of Pennsylvania, 320.

Purdon's Digest, 1883, 1st Volume, page 204, as to corporate powers under this Act.

XX. To establish a nightly watch, to light the streets, to provide a supply of water for the use of the inhabitants, to make all needful regulations for the protection of the pipes, lamps, reservoirs, or other constructions or apparatus, and to prevent the waste of water so supplied.

The repealing clause of the Act 29 *April*, 1874, Section 46, *Pamphlet Laws of Pennsylvania*, 1874, 107—Purdon's Digest, 1883, page 349.

That from and after the passage of this Act, the Acts of the General Assembly entitled "An Act to encourage manufacturing operations in this Commonwealth," approved April seventh, one thousand eight hundred and forty-nine; "An Act to enable joint tenants, tenants in common, and adjoining owners of mineral lands in this Commonwealth, to manage and develop the same," approved April twenty-first, one thousand eight hundred and fifty-four; "An Act relating to Corporations for mechanical manufacturing, mining and quarrying purposes," approved July eighteenth, one thousand eight hundred and sixty-three; "An Act to provide for the incorporation of iron and steel manufacturing companies," approved March twenty-first, one thousand eight hundred and seventy-three, and the several supplements to each of said Acts, be and the same are hereby repealed so far as they provide for the creation of corporations for any of the purposes provided for by this Act, or are inconsistent with this Act.

Article XVI. Constitution of Pennsylvania, entitled

PRIVATE CORPORATIONS.

Section I. All existing charters or grants of special or exclusive privileges, under which a *bona fide* organization shall not have taken place and business been commenced in good faith, at the time of the adoption of this Constitution, shall thereafter have no validity.

* * * * * * *

Section 8. *Municipal* and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction. *

* * * * * *

The laws of Pennsylvania relating to *Municipal Corporations* in force at the time of the acceptance by The Lehigh Water Company of the *Private Corporation Act* of April 29, 1874, are as follows, to wit:

"AN ACT"

"dividing the cities of this State into three classes, regulating the passage of ordinances, providing for contracts for supplies and work for said cities, authorizing the increase of indebtedness, and the creation of a sinking fund to redeem the same, defining and punishing certain offences in all of said cities, and providing for the incorporation and government of cities of the third class."

See Act of 23d of May, 1874, § 1. Pamphlet Laws of Pennsylvania of 1874, page 230.

This is also found in Brightly's Digest of the Laws of Pennsylvania, edition of 1883, page 1213.

By the Act of 11th of April, 1876, Pamphlet Laws of 1876, page 20, on the same page of Brightly's Digest as is referred to above, the further division of cities is made, to wit:

"Those containing a population less than thirty thousand, and exceeding twelve thousand, shall constitute the fourth class."

"Those containing a population less than twelve thousand shall constitute the fifth class

"2. The corporate powers and the number, character, powers and duties of the officers of cities of the first, second, third, fourth and fifth classes, now in existence, by virtue of the laws of this Commonwealth, shall be and remain as now provided by law, except where otherwise provided by this Act."

"IV. INCORPORATION OF CITIES."

"Cities of the third, fourth and fifth class shall be chartered whenever a majority ef the electors of any town or borough, or of any two contiguous towns or boroughs, having a population of at least ten thousand, shall vote at any general election in favor of the same." * * *

See Act of 23d of May, 1874, § 14, Pamphlet Laws of 1874, page 234, so amended by Act of 11th of April, 1876, Pamphlet laws of 1876, page 21. Brightly's Digest, same edition as above, page 1216, placitum 23.

"V. CORPORATE POWERS."

"30. The said cities of the third, fourth and fifth classes, coming under the provisions of this Act in their corporate capacities, are authorized and empowered to enact ordinances for the following purposes, in addition to the other powers granted by this Act."

Brightly's Digest, page 1218, placitum 30—page 1219, placitum 39, as follows:

"39. IX. To have at all times the exclusive right to supply with water the city, and such persons, partnerships and corporations therein as may desire the same, at such prices as may be agreed upon, and for that purpose to have at all times the unrestricted right to make, erect and maintain all proper water works, machinery, buildings, cisterns, reservoirs, pipes and conduits for the raising, reception, conveyance and distribution of water; or to make contracts with and authorize any persons, company or association to erect all proper water works, machinery, buildings, cisterns, reservoirs, pipes and conduits for the raising, reception, conveyance and distribution of water and give such person, company or association the exclusive privilege of furnishing water as aforesaid for any length of time not exceeding ten years.